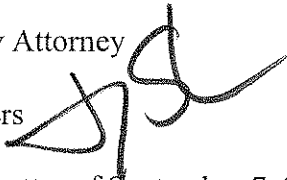




MEMORANDUM

September 28, 2007

TO: Mike Aguirre, City Attorney

FROM: Mayor Jerry Sanders 

SUBJECT: Response to your Letter of September 7, 2007 regarding Pension Issues

Because I believe it is in the best interests of taxpayers to responsibly return to the public finance markets as soon as possible, my administration is focused on achieving this critical goal. I believe that the City should take all prudent steps to reduce its pension and retiree healthcare liability and as such, I will continue to support litigation to determine the legality of the various benefits in question. I will not support a tax increase to pay for these benefits nor do I support bankruptcy. Absent the legal authority to roll-back the alleged illegal benefits, the City of San Diego will continue to implement the aggressive reforms that I have introduced and live within our means as our taxpayers should expect. I will propose a new pension plan for future City employees.

This memo responds to your September 7, 2007 letter to me regarding fourteen issues you claim must be resolved before the City can return to the public securities market. I disagree with many of your assertions and will detail my positions on the issues below.

The pension and healthcare benefits conferred upon our employees by past City Councils jeopardize the City's long-term fiscal health. I will continue to support the various lawsuits, including appeals, aimed at determining the legality of the benefits conferred upon employees. That said, it is not prudent to recommend to the City Council that we summarily rescind pension benefits without the proper legal authority.

You have repeatedly failed to reduce the City's pension liability by rolling back the alleged illegal benefits and now you want the City Council to put San Diego taxpayers at great legal and financial risk by acting outside the law. I have said repeatedly and I will say again that I won't do this – only a judge can make such a decision. Pursuit of the reckless course you now demand in your letter would expose San Diego taxpayers to millions of dollars in liability and would set our city on a course that could very well lead to contempt of court. Until and unless a court of law grants the City authority to retroactively rescind these benefits, my plan is to propose a new pension plan for future

City employees beginning next fiscal year, and to seek collective bargaining agreements that are more advantageous to San Diego taxpayers.

I believe that with continued belt-tightening and fiscal discipline over a period of years, our long-term obligations can be managed, especially as the City's revenues naturally increase over time. I do not believe it is appropriate to ask the voters to tax themselves to pay for these benefits.

As a result of an entirely new set of financial controls and disclosure practices, I believe the City will soon be ready to re-access the public bond markets so that we can more efficiently fund our City's long-delayed and much-needed infrastructure improvements. As you know full well, the markets are interested in complete transparency and the full disclosure of all our debts and liabilities. Those will be the hallmarks of our return to the bond market. The rating agencies and the markets – not you – will determine our credit worthiness. I believe we will have a very good case to make.

Your assertion that I have made false or misleading statements regarding the City's financial situation is not accurate. I have made it clear on countless occasions that it will take significant discipline over years to correct the many mistakes that had been made in the past and get the City back to fiscal and managerial health – there is no silver bullet.

As the City's first strong mayor in over 70 years, my administration has worked hard to better the City's financial position including cutting the City's payroll and funding long-term obligations such as the pension and retiree health systems. I am proud of what we have accomplished to date, and I believe San Diegans have a right to know of this progress. Most of our accomplishments have been achieved in spite of the obstructionist tactics of the City Attorney's office and without the benefit of legal counsel.

Your public statements are often at odds with your actions behind closed doors. I include some pension-related examples because I think they call into question your credibility on the various issues you raise.

- Just a month ago, you gave 101 employees of the City Attorney's office discretionary pay increases totaling \$403,000 per year. These raises are all pensionable and will increase the City's pension liability. You gave these pay increases in spite of the fact that: 1) you publicly opposed raises for police officers and all other city employees on the basis that they would add to the pension liability; 2) the City Council specifically did not approve pay increases for the Deputy City Attorneys Association; and 3) you claimed that the cuts that were made to your budget would force you to lay off neighborhood prosecutors. Amazingly, some employees who had received raises just a few weeks before in July, were given pay reductions in August.¹
- You supported a plan earlier this summer that would have continued the under-funding of our pension system and resulted in negative amortization. In a June 13, 2007 email to one of my staff members, your representative wrote that you were

¹ See Exhibit 1 for a chart detailing these pay increases.

recommending paying \$1.6 million in legal fees to attorney Michael Conger from our pension contribution. When asked if you had personally approved this scheme, the answer was “yes.”²

- You have claimed as late as August 21, 2007 that the San Diego City Employees’ Retirement System (hereafter referred as “SDCERS” or “Pension System” or “Retirement System”) is stable and that the City is doing everything necessary to fund it properly.

In a brief filed before Judge Barton on August 21, 2007, you represented that the Pension System is sufficiently stable and current and that there is no immediate need to resolve the pending litigation with SDCERS. You wrote: “As a result of those litigations, the City is obligated to make (and is making) payments to restore the San Diego City Employees’ Retirement System (‘SDCERS’ or ‘pension system’) funding to the actuarially-required level. Specifically, as a result of judgments in prior cases (Gleason and McGuigan), the City has provided SDCERS with real property security in the amount of \$475 million, has committed to making additional cash funding infusions to SDCERS of \$173 million (McGuigan), and is required to make contributions (ARC) to SDCERS annually from 2006 forward (Gleason). Indeed, the Mayor’s current budget provides for payments of “ARC-plus” infusing the Pension System with payments of over \$20 million above ARC in FY2008 alone.”³

Further, in the litigation brought against the City by the Police Officers Association, your agents have defended the City by asserting that the Pension System is actuarially sound and well-funded.

In his report filed as part of your case, your expert witness, actuary Joe Esuchanko, testified as follows: “...there is no material risk that SDCERS will be unable to pay the pension benefits which the City has agreed to pay its existing retirees, terminees entitled to future benefits and current employees.”⁴ Amazingly, you claim otherwise in this letter.

Let me make clear three very important points. First, your position is adverse to the taxpayers’ best interest. You should be doing everything possible to get our City back into the bond market – not to try and keep us from it. While the City has been able to obtain very favorable rates to privately finance water and wastewater projects, the simple fact is that our taxpayers are paying a premium because of our inability to access public capital.

The very fact that you are obstructing our re-entry into the public markets means that taxpayers will pay a higher price for private financing and other projects, such as

² See Exhibit 2 for a copy of the email between Kristine Wilkes and Fred Sainz.

³ See Exhibit 3 for a copy of the brief filed by the City Attorney on August 21, 2007

⁴ See Exhibit 4 for a copy of Mr. Esuchanko’s Expert Report as well as a cover memo written to the Mayor by the SDCERS Administrator.

improvements to City facilities and roadways, will simply not get done. You are acting in a position completely contrary to the fiduciary position you have to taxpayers.

If we are unable to re-access the markets in a timely fashion for reasons having to do with your failure to perform your job as City Attorney, I will not hesitate to speak out publicly. At this very moment, we are waiting for you to provide the Attorney's Representation Letter for the FY05 Comprehensive Annual Financial Report (CAFR). It is long overdue and will preclude our issuance of the FY05 CAFR.

Second, I believe your memo and your actions are an indirect effort to drive our City into bankruptcy. Perhaps you believe that a bankruptcy proceeding would provide you with enhanced influence to policy decisions currently outside your authority. This will not happen while I am mayor. If bankruptcy is your goal, as many believe it is, then be honest about it and stop the game-playing that is wasting time and taxpayer money.

Third, you often take statements out of context and use them inappropriately to support your point of view. An example of this appears in the conclusion to your letter when you state that the Securities & Exchange Commission (SEC) "has noted that the only way to solve the problems created was by decreasing the debt, increasing the revenues, or cutting services." The paragraph is written in such a way that it would have you believe that the SEC is referring to the present day. That is not the case. It is a statement regarding the choices made by past City Councils. I will not endorse a tax increase and absent the legal authority, which you have so far been unable to obtain, we will have to live within our means. This is the responsible course of action.

In the very next paragraph, you assert that "rather than do the work needed to get rid of the illegal debt...the Mayor and certain members of the City Council have opted to continue the past practices of relying on the pension system's phony numbers and pushing the debt off to future generations." This is pure demagoguery.

After losing all of the pension roll-back lawsuits that you have brought, you are now demanding that the City Council take action that would be completely inappropriate and place our taxpayers in great jeopardy. As you know, SDCERS's numbers have been verified by the actuary that you recommended the City retain and have used as an expert witness. Finally, the 20-year amortization schedule, as I have structured it, eliminates any negative amortization.

I have served as Mayor now for almost twenty-two months. We have had scores of conversations and our staffs have met on just as many occasions. I find it telling that never once in all of those twenty-two months did you establish your fourteen remedial steps as pre-conditions to re-enter the public markets.

The City has not had access to public capital since 2003. All you have to do is drive down any one of our City streets to see that our public infrastructure is suffering as a result of this. I have made it my goal to re-access the public markets as soon as possible

in a manner consistent with full disclosure. I ask you to put aside your personal political agenda and work collaboratively with us to make this goal a reality.

Alleged Remediation Items Detailed in Your Letter

The majority of your claims lack merit, have been dismissed by courts of competent jurisdiction or are unnecessary impediments to the City's return to the bond markets. My response to each of them is set out below.

Responses to Remediation Items 1-4 & 13:

- #1: Rescind MP-1 and MP-2 Benefits
- #2: Actual Value of Purchase of Service Credits (PSC's)
- #3: Actual Value of Deferred Retirement Option Plan (DROP)
- #4: Purchase of Service Credits/10 and 20 year Vesting
- #13: Continue Litigation to Remove Illegal Pension Benefits

None of these items are impediments to the City's return to the bond markets.

As I have stated previously, I have supported all of your pension litigation. In spite of the fact that your arguments have been rejected repeatedly, I continue to believe that the legality of the benefits should be decided by the courts.

Your efforts have cost the taxpayers a minimum of \$6.6⁵ million, as follows.

Contractor	Amounts Paid to Date
City of San Diego Expenses:	
Latham & Watkins	\$2,540,969.91
Heller Erhman	1,321,896.34
Wehner & Perlman	215,965.65
Actuarial Services Co.	183,624.65
Kramm & Associates	12,551.45
Legal Reprographics	15,018.55
Video Track	13,959.38
AJL Video	12,157.81
SUB-TOTAL	\$4,316,143.74
SDCERS Expenses as of 8/31/07	\$2,327,166.82
TOTAL	\$6,643,310.56

⁵ See Exhibit 5 for a detailed summary of the expenses listed here.

I believe this amount to be on the low side as it only includes Latham & Watkins bills received through June 30, 2007 and SDCERS expenses through August 31, 2007. These figures also do not include our own staff's time or their related expenses. Naturally, all of these figures will climb with appeals.

Because I believe so strongly in the authority of the courts, I reject your arguments that the City Council and I can summarily rescind benefits that a court has been unwilling to roll back.

- Your first, second, third and fourth issues have been raised and rejected by the Superior Court in cases you tried and lost. The MP1 claims were ruled on by Judge Barton after a full trial in which you presented evidence by an actuary of the costs of alleged illegal benefits, including DROP, PSC's, 10/20 year vesting and the like. The Court held that these claims were merged in the Corbett settlement and also barred by the statute of limitations.

Thus, to advise the City that these benefits must be rescinded by the City Council before the City can return to the bond market places the City in potential contempt of court. Absent a successful appeal, issues demanding a roll back of alleged illegal benefits, including DROP, PSC's, and 10/20 year vesting schedules are closed.

- As for the proper valuation of DROP or PSC's, to the extent SDCERS allegedly improperly valued either, if the City has legal recourse, I will pursue it.
- With regard to MP2, you also lost that claim in Judge Barton's court. Moreover, while you claim the Judge did not reach the merits of the claim, his ruling that the statute of limitations barred further claims against newly named necessary parties is a direct result of your office's poor legal work. You refused to bring in the necessary parties earlier, despite repeated and early warnings that such an action was legally necessary. The Judge sustained the demurrer to your 6th attempt to plead a proper cross-complaint in that case, and again, absent a successful appeal, claims regarding MP2 are foreclosed.

I plan to focus my efforts on a new pension system for new employees and more beneficial arrangements in collective bargaining agreements negotiated with employee bargaining units next year. When all five of the City's employee unions come to the bargaining table in January, I will make my case for an entirely new system for future employees. This system will help us to reduce future liabilities.

I believe strongly that the DROP program and Purchase of Service Credits should be cost neutral.

In preparation for our negotiations with the POA, Local 145 and the City Attorneys Association going into FY08, I informed your office that I wanted to negotiate these two issues with the unions that were at the table; my goal was to achieve cost neutrality.

Your office advised my staff not to negotiate these issues as it was the prerogative of management alone to confer or alter these two benefits. We took your advice and began our negotiations on a separate list of issues. Just a few weeks later, your office then changed its previous advice and told us that DROP and PSC's were indeed subject to meet and confer. By that time, it was too late to introduce them as subjects of our bargaining since all economic issues must be introduced prior to the commencement of bargaining. I intend to deal with them as part of the upcoming round of labor negotiations.

On Monday, September 24th, we received a notice to docket from your office with a proposed ordinance amending the Municipal Code to make the DROP program cost-neutral. While I strongly support this concept, I am unsure, based on your previous legal advice, as to whether the City can unilaterally take this action. This is a good example of the continued inconsistency of your legal counsel.

Response to Remediation Item 5: City Attorney Counsel for Pension System

This item is not an impediment to the City's return to the bond markets.

As you know, I initially agreed with you on this point. However, your claim that you be declared counsel for the Pension System has nothing to do with the City's right and responsibility to return to the financial markets. Mixing the two issues is ridiculous and irresponsible. Further, Judge Barton addressed that claim and denied your demand to be SDCERS counsel under the circumstances presented, which were not limited to the duration of that litigation. Your writ before the Court of Appeal on this very issue was denied.

In his ruling, Judge Barton wrote: "The Office of the City Attorney has no right to fire SDCERS' independent counsel and appoint counsel of its choosing..."⁶ This case continues to this day.

Response to Remediation Item 6: Reform Management of Pension System

This item is not an impediment to the City's return to the bond markets.

The Pension System has made significant changes to its managerial practices as well as its system of internal controls. There is undoubtedly more that can and should be done. Consistent with my agenda for City government, I will continue to encourage SDCERS to reform itself.

Effective April 1, 2005, Prop. H changed the composition of the Board from a majority of employee members to a majority of independent Trustees who must have extensive financial background and no personal financial interest in SDCERS.

⁶ See Exhibit 6 for a copy of Judge Barton's ruling.

I think that you will agree that the Retirement System has made a number of significant reforms. There may very well be more but the future implementation of these reforms should not keep us from the public markets.

SDCERS reforms include:

- Since the Board's reconstitution, there have been numerous changes at the Retirement System, including: a new actuary; new fiduciary counsel; a new administrator; a new general counsel; a new financial officer; a new chief compliance officer (newly created position); a new internal auditor (newly created position); a new information systems director; and a new management structure.
- Commissioning the independent Navigant Consulting Report and addressing its findings;
- Filing with the Internal Revenue Service (IRS) for a Tax Determination Letter to confirm SDCERS's status as a tax qualified governmental retirement plan;
- Entering the IRS's Voluntary Correction Program (VCP) to work cooperatively to resolve past mistakes in administering the Trust Fund;
- Requesting IRS approval of SDCERS's change to a Group Trust, in which each of our three plan sponsors' assets are legally-protected from the other plans; and
- Creating an independent Audit Committee that has a majority of independent, non-board members.

SDCERS has completed an Actuarial Funding Study that included adopting more conservative and widely accepted actuarial methods and assumptions, including a new, shorter amortization period for the City's unfunded liability, recognition of contingent liabilities and moving to EAN from PUC.

It bears mentioning that Joe Esuchanko, the actuary you recommended we hire and your litigation expert, has confirmed that SDCERS is actuarially sound. In response to a question from a City Councilmember at a public meeting held on April 17, 2007, Mr. Esuchanko affirmed the actuarial soundness of the Retirement System, "There is quite a bit of concern as to whether SDCERS is actuarially sound. Yes it is [sound]."

The IRS has made no official demand on either SDCERS or the City to pay \$100 million into the pension fund liability to replace funds used to pay for health care. On February 13, 2007, the IRS commented that healthcare under-funding should be part of SDCERS' VCP proposal. However, at a meeting with the IRS on February 26, 2007, and in a letter to the IRS on March 14, 2007, SDCERS is working with the IRS to reconsider its position.

Nonetheless, the possibility of this liability has been disclosed in the FY03 and FY04 CAFR's and will continue to be disclosed in future CAFR's until resolved.

You state that "responsible trustees must be appointed before the City can represent to investors that it has in place proper internal controls." The pension system's trustees are vetted through your office and must meet pre-determined qualifications. They have adopted and implemented a new set of internal controls and they have demonstrated competence in managing the system's assets. Over the past fiscal year, they have had a 16% rate of return; over the past three fiscal years, they have experienced a 13.22% rate of return; and over the past five fiscal years, the rate of return has been 12.97%.

We continue looking for qualified candidates to serve as trustees. The irony of your observation is that most qualified candidates cite you as their reason for not wanting to serve. Your continued threats to sue the volunteer trustees and your repeated acts of intimidation are the reasons most prospects cite for not wanting to serve.

Response to Remediation Items 7 & 9:

Item #7: Remove Surplus Earnings

Item #9: Confirm DROP & Purchase Service Credits Ended as of FY05

These items are not impediments to the City's return to the bond markets.

We have no dispute with your seventh and ninth claims. However, the fact that these are still outstanding issues is a direct result of inaction, delay and poor legal work on the part of your office. Repeated requests were made to you to draft legislation to remove surplus earnings as an avenue for payments of contingent liabilities or retiree health care (the "Waterfall"). After long delays, your office finally presented an Ordinance to eliminate the Waterfall. Your draft Ordinance was criticized as legally inadequate by experts in this area of law. To date, you have refused to change one word in the pending Ordinance, and it remains in limbo awaiting a reintroduction before Council.

This same pattern of delay and inaction has also created legal uncertainty around the effective date of key pension reforms. As a result of the 2005 labor negotiations, the City eliminated certain pension benefits -- including retiree health care, DROP and PSC's -- for new employees hired after July 1, 2005. Despite repeated requests from both the Council President and me, your office refused to provide us with the legislation required to codify these changes. The changes were not codified until February 2007. Your inaction may cost the taxpayers millions of dollars.

You are correct in that there are competing legal opinions on this issue. As a result, I will ask the City Council for the authority to file a Declaratory Relief action so that the issue can be settled once and for all. I will also ask the City Council to hire outside legal counsel to represent the City on this issue.

Response to Remediation Item 8: Misrepresentation in IRS 5300 Determination Letter

This item is not an impediment to the City's return to the bond markets.

The letters you cite are part of ongoing discussions with the IRS that began in July 2005 and continue to this day.

Response to Remediation Item 10: Reduce and fund pension deficit of \$1 billion within 15 year amortization

This item is not an impediment to the City's return to the bond markets.

There will be no tax increase to pay for the pension benefits. You have failed to convince multiple courts to rescind them, so now you want the City Council to act outside the law. I cannot and will not recommend this course of action.

You claim there must be a 15-year amortization schedule. However, the Attorney General issued an opinion that held that voters couldn't bind pension boards in the determination of amortization schedules. SDCERS has decided on a 20-year amortization schedule. I wholeheartedly concur with their decision. The important part of such a schedule is that there is no negative amortization in the City's 20-year repayment plan. There is absolutely no reason for the financial markets to be concerned with a 20-year schedule if the City continues to pay its Annual Required Contribution.

Response to Remediation Item 11: Reduce and Fund Retiree Health Care Deficit

This item is not an impediment to the City's return to the bond markets.

While we must address this obligation, I strongly disagree with the rash actions you recommend. It is my plan to proceed deliberately and responsibly on two fronts. First, by creating a trust/investment vehicle to maximize our return on investment of retiree health care dollars.

Second, during the upcoming round of negotiations with our employee labor unions, I will negotiate in good faith to effect changes to the benefits for employees hired before July 1, 2005. I will negotiate in a manner that is consistent with the taxpayers' best interests.

Response to Remediation Item 12: Retain City Actuary

This item is not an impediment to the City's return to the bond markets.

The City does need to retain an actuary.

As with so many other issues raised by your September 7th letter, this issue has also suffered from the mismanagement of your office. One of the first actions I took upon assuming office was to hire the actuary that you recommended, Mr. Esuchanko. You used him in your various pension cases. While the amounts Mr. Esuchanko billed for City work remained well within the amount authorized by the City Council, your office's failure to pay close attention to his billing for the pension cases resulted in significant cost overruns well beyond the Council-approved contract limits. Because of the City Council's justified outrage at this mismanagement, the status of this contract remains uncertain.

Response to Remediation Item 14: False or Misleading Statements About City Financial Conditions

This item is not an impediment to the City's return to the bond markets.

You allege that certain Councilmembers and I have made false or misleading statements about the City's financial conditions. Nothing could be further from the truth. What concerns me is your repeated insistence that the City is near bankruptcy when our financials do not support this course of action.

The truth is that we have restored stability and discipline to City Hall. We have also meaningfully begun to fund obligations that have not been funded in the past. I inherited a government that was in serious need of repair. With the cooperation of our City Council, we have begun to make important changes.

It will take time to implement all of our reforms, but much has been accomplished, including:

- San Diego voters passed a "Strong Mayor" form of government, instilling operational responsibility in one chief executive officer accountable to the voters. Since January 2006, I have served in that position. I have brought an aggressive reform agenda to City Hall, including streamlining government operations to make them more efficient and effective. The City's fiscal health and the institution of a comprehensive set of financial controls have been my main priorities.
- As part of the "Strong Mayor" reform, voters also created the office of the Independent Budget Analyst (IBA) to advise the City Council on the financial implications of our various policy initiatives.
- I have proposed, and the City Council has passed, after exhaustive review, two balanced budgets that allow us to live within our means and begin paying down our obligations. The budgets were prepared under the direction of the City's first-ever Chief Financial Officer, a position which I created.

- My administration has completely overhauled the budgeting process to make the document more transparent, including the elimination of “phantom” or supplemental employees and the alignment of costs with their true cost centers.
- As part of the FY08 budget adopted by the City Council, City employment will drop from 11,416.35 FTE’s to 10,777.85 FTE’s as a result of the elimination of 639 FTE positions.
- My administration has launched a massive effort to examine and streamline every department, process or function of City government reporting to the Mayor. This process, known as “Business Process Re-engineering” (BPR) has already resulted in approximately \$32 million in savings. Further substantial savings from BPR’s are expected as more are completed.
- The City renegotiated the PETCO Park bonds, saving taxpayers nearly \$4 million in annual debt payments.
- My administration has ended the practice of using one-time revenues for on-going expenses.
- Last year, I introduced a Five Year Financial Outlook (FYFO) to guide the City’s budgetary priorities. The document was the basis for my FY08 budget proposal and will, by necessity, be updated routinely with new information. The FYFO established the funding of long-term obligations as our top budget priority.
- As a result of the FYFO, the City Council voted unanimously to dedicate an unprecedented \$104.3 million to 7 long-term obligations that have in the past been chronically under-funded, as follows:
 - Funding to the Pension System above and beyond the ARC to achieve no negative amortization: \$27.3 million
 - Funding for Retiree Health: \$25 million
 - Funding for Deferred Maintenance and Capital Improvements: \$15.7 million
 - ADA Compliance Funding: \$10 million
 - Funding for Reserves: \$3.3 million
 - Funding for stormwater pollution prevention system improvements: \$18 million
 - Funding for public liability fund: \$5 million.
- As part of the FYFO, I have proposed continued aggressive funding for these obligations – as well as a contribution to our Workers Comp Fund.
- Separately, due to the efforts of my administration, the City has contributed an additional \$108 million to the Pension System as a result of our leveraging of the tobacco revenue stream.

- I appointed a new Internal Auditor, Eduardo Luna, who will report out to the City Council's Audit Committee on his work.
- The City Council has created Budget and Audit Committees, independent from management.
 - In anticipation of the Council's consideration of my budget, the Budget Committee held months of public hearings on the proposal.
 - The Audit Committee, which is aided by an Ad Hoc Advisory Committee, has developed a legislative review process for the City's CAFR. The Audit Committee will also review all financial offerings under a pre-approved set of questions, which internal and external auditors must attest to.
 - The City Council will soon consider hiring the firm of Jefferson Wells to serve as the professional audit consultant for the Audit Committee.
 - There has also been systematic City Council financial training regarding disclosure and debt issuance. Management has also received training regarding these issues.
- The City established the Disclosure Practices Working Group to review all financial documents, including the City's CAFR, prior to their release.
- We have completed and received "clean" opinion letters for the City's long-outstanding FY03 and FY04 financial statements.
- We completed the Kroll investigation and negotiated a settlement with the Securities and Exchange Commission. Consistent with the Kroll report and the SEC settlement, the City has hired an independent consultant to help the City comply with the findings.
- An entirely new set of financial controls are being instituted to insure complete transparency in our financial reporting practices.⁷

In October, my staff will present the latest Kroll remediation update to the City Council. At that time, we will inform them that approximately 70 or 65% of the 121 remediation items have been completed or are substantially complete and more than 20 additional items are in process.

Separately, 106 internal control weaknesses were identified either by our Auditor & Comptroller or by our external auditors. To date, 47% of those have been remediated

⁷ Exhibit 7 contains copies of all the progress reports the Sanders Administration has made to the City Council to date on the recommendations in the Kroll Report. The vast majority of those reforms involve changes to the City's financial controls.

and tested or remediated and not yet tested. 43% are in process and 9% have not yet been started. Clearly, the restructuring of our internal controls is something that we have taken very seriously and are attacking aggressively.

- A new ERP system will be implemented over the next two years to further aid our financial reporting systems.
- We crafted and shepherded to passage a comprehensive \$1.4 billion plan to repair the City's decrepit water and wastewater infrastructure. In spite of federal and state edicts, virtually no improvements had been made to either system in four years.

In order to ensure that these funds are used properly, financial and performance audits will be conducted every year on the water and wastewater budgets every year.

- We have launched a comprehensive review of various City Charter issues for consideration by the voters next year. The changes being considered include a permanent, independent Audit Committee and the establishment of a permanent independent Internal Auditor function separate from the City Controller.

I will continue taking all proper steps to bring the City back to financial stability. I will not put the City in legal jeopardy by recommending that the City Council act outside the law. There is no silver bullet to solve all of the City's fiscal and managerial problems. Our problems can only be solved over time and with a great deal of discipline.

At this important time in the City's history, it's important that we work cooperatively and constructively to solve our problems. I ask you to join that effort.

Thank you.

cc: Honorable Members, San Diego City Council
Kelly Bowers, SEC
Andrea Tevlin, San Diego Independent Budget Analyst
Stan Keller, Independent Consultant

Exhibit 1

		Original Salary		Effect of 7/30/07 Raise				Summary of Payroll Actions from 7/30 - 8/24				DCAA		
		Estimated Annual						Estimated				DCAA		
Class	Number	Last Name	First Name	Hourly Rate	Salary Prior to	Hourly Rate	Estimated Annual	Percentage	Estimated Annual	Hourly Rate	As of	Annual Salary	Estimated	Fee/Due
				Prior to	Raise	Post Raise	Salary Post Raise	Increase	Increase	8/24	Post Raise	Annual Increase	Annual Increase	Payer
1	2151	Ables	Melissa	\$ 29.05	\$ 60,417.76	\$ 30.21	\$ 62,830.56	4%	\$ 2,412.80	\$ 30.21	\$ 62,830.56	\$ -	-	Dues
2	2151	Adams	Diana	46.50	96,728.32	48.36	100,595.04	4%	3,866.72	48.56	101,000.64	405.60	-	Dues
3	2151	Aguilar	Andrew	30.54	63,531.52	32.22	67,025.92	6%	3,494.40	32.22	67,025.92	-	-	Dues
4	2151	Bean	Darren	29.05	60,417.76	29.77	61,927.84	2%	1,510.08	29.77	61,927.84	-	-	Dues
5	2151	Beattie	Kristin	40.20	83,605.60	41.80	86,950.24	4%	3,344.64	41.80	86,950.24	-	-	Dues
6	2151	Belkows	Christina	36.75	76,446.24	38.22	79,499.68	4%	3,053.44	39.75	82,680.00	3,180.32	-	Dues
7	2151	Billy Turner	Catherine	46.71	97,146.40	50.30	104,615.68	8%	7,469.28	48.56	101,000.64	(3,615.04)	-	Dues
8	2151	Boardman	Jane	44.23	92,000.48	46.50	96,728.32	5%	4,727.84	46.50	96,728.32	-	-	Dues
9	2151	Bradley	Catherine	67.54	140,479.04	69.71	145,000.96	3%	4,521.92	69.71	145,000.96	-	-	Dues
10	2151	Bradley	Todd	41.34	85,987.20	42.99	89,427.52	4%	3,440.32	42.99	89,427.52	-	-	Fee
11	2151	Brannan	Gabriela	40.13	83,474.56	41.74	86,612.96	4%	3,338.40	41.74	86,612.96	-	-	Dues
12	2151	Brock	Carmen	44.71	93,005.12	46.50	96,728.32	4%	3,723.20	46.50	96,728.32	-	-	Fee
13	2106	Burton	Kathryn	54.40	113,152.00	61.19	127,279.36	12%	14,127.36	61.19	127,279.36	-	-	Fee
14	2151	Calabrese	Michael	42.99	89,427.52	48.36	100,592.96	12%	11,165.44	48.36	100,592.96	-	-	Fee
15	2151	Carlyle	Huston	66.19	137,668.96	68.84	143,176.80	4%	5,507.84	68.84	143,176.80	-	-	Fee
16	2151	Carnahan	Andres	29.05	60,417.76	30.21	62,830.56	4%	2,412.80	30.21	62,830.56	-	-	Dues
17	2151	Chung	Walter	54.40	113,152.00	58.84	122,387.20	8%	9,235.20	58.84	122,387.20	-	-	Fee
18	2151	Coleman	Elizabeth	33.98	70,676.32	35.34	73,503.04	4%	2,826.72	35.34	73,503.04	-	-	Fee
19	2151	Council	Ann	40.68	85,028.32	42.51	88,429.12	4%	3,400.80	42.51	88,429.12	-	-	Dues
20	2151	Davidian	Daniela	44.26	92,067.04	46.03	95,750.72	4%	3,683.68	46.03	95,750.72	-	-	Fee
21	2151	Davies	Kimberly	48.36	100,595.04	50.30	104,615.68	4%	4,020.64	50.30	104,615.68	-	-	Fee
22	2151	Davis	Matthew	29.05	60,417.76	30.50	63,437.92	5%	3,020.16	30.50	63,437.92	-	-	Fee
23	2151	Del Portillo	Jorge	30.21	62,830.56	31.72	65,971.36	5%	3,140.80	31.72	65,971.36	-	-	Dues
24	2151	Delara	Pedro	31.42	65,345.28	32.67	67,957.76	4%	2,612.48	32.67	67,957.76	-	-	Dues
25	2151	Dickenson	Malinda	43.27	89,999.52	46.50	96,728.32	7%	6,728.80	44.71	93,005.12	(3,723.20)	-	Fee
26	2151	Dixon	Andrea	39.75	82,680.00	41.34	85,987.20	4%	3,307.20	41.34	85,987.20	-	-	Dues
27	2151	Doherty	Diane	38.22	79,499.68	39.75	82,680.00	4%	3,180.32	39.75	82,680.00	-	-	Fee
28	2151	Epley	Lourdes	35.35	73,534.24	36.75	76,446.24	4%	2,912.00	36.75	76,446.24	-	-	Fee
29	2151	Fain	Nina	30.21	62,830.56	31.42	65,345.28	4%	2,514.72	31.42	65,345.28	-	-	Fee
30	2151	Fitzgerald	Christine	46.50	96,728.32	48.36	100,595.04	4%	3,866.72	48.36	100,595.04	-	-	Fee
31	2151	Folkman	Paige	32.67	67,957.76	33.98	70,676.32	5%	2,718.56	33.98	70,676.32	-	-	Dues
32	2151	Fonseca	Jeremy	34.20	71,125.60	35.91	74,682.40	5%	3,556.80	35.91	74,682.40	-	-	Dues
33	2151	Fossler	Kristen	39.76	82,698.72	41.75	86,833.76	5%	4,135.04	41.75	86,833.76	-	-	Dues
34	2151	Garland	Michelle	41.34	85,987.20	46.50	96,728.32	12%	10,741.12	41.34	85,987.20	(10,741.12)	-	Dues
35	2151	Geisler	Angela	30.75	63,960.00	32.29	67,159.04	5%	3,199.04	32.29	67,159.04	-	-	Fee
36	2151	Gersten	William	48.36	100,595.04	50.30	104,615.68	4%	4,020.64	50.30	104,615.68	-	-	Dues
37	2151	Greene	Marianne	39.75	82,680.00	41.34	85,987.20	4%	3,307.20	41.34	85,987.20	-	-	Fee
38	2151	Hansen	Steven	62.13	129,224.16	64.81	134,392.96	4%	5,168.80	64.81	134,392.96	-	-	Dues
39	2151	Harris	Rahbekka	35.34	73,503.04	36.75	76,446.24	4%	2,943.20	36.75	76,446.24	-	-	Fee
40	2151	Hazard	Paige	30.21	62,830.56	31.42	65,345.28	4%	2,514.72	31.42	65,345.28	-	-	Fee
41	2151	Hemmerling	John	38.22	79,499.68	39.75	82,680.00	4%	3,180.32	39.75	82,680.00	-	-	Fee
42	2151	Henderson	Bruce	30.21	62,830.56	31.42	65,345.28	4%	2,514.72	31.42	65,345.28	-	-	Dues
43	2151	Herrin	Michael	33.98	70,676.32	35.34	73,503.04	4%	2,826.72	35.34	73,503.04	-	-	Dues
44	2151	Hershman	Han	37.12	77,201.28	38.97	81,061.76	5%	3,860.48	38.97	81,061.76	-	-	Fee
45	2151	Hiezlep	Steffanie	29.05	60,417.76	30.21	62,830.56	4%	2,412.80	30.21	62,830.56	-	-	Dues
46	2151	Hsu	Bonny	32.67	67,957.76	35.34	73,503.04	8%	5,545.28	35.34	73,503.04	-	-	Fee
47	2151	Hudson	Michael	30.54	63,531.52	31.77	66,073.28	4%	2,541.76	31.77	66,073.28	-	-	Dues
48	2151	Hunt	Terri	29.05	60,417.76	29.92	62,229.44	3%	1,811.68	29.92	62,229.44	-	-	Dues
49	2106	Jacobo	Margaret	61.19	127,279.36	66.19	137,668.96	8%	10,389.60	66.19	137,668.96	-	-	Dues
50	2151	Jones	Andrew	45.28	94,178.24	48.36	100,595.04	7%	6,416.80	47.07	97,903.52	(2,691.52)	-	Dues
51	2151	Ladewig	Brock	42.99	89,427.52	44.71	93,005.12	4%	3,577.60	44.71	93,005.12	-	-	Fee
52	2151	Lancaster	James	41.34	85,987.20	42.99	89,427.52	4%	3,440.32	42.99	89,427.52	-	-	Dues
53	2151	Lapin	Jonathan	43.19	89,824.80	44.91	93,416.96	4%	3,592.16	44.91	93,416.96	-	-	Dues
54	2151	Lastomirsky	Steven	44.71	93,005.12	46.50	96,728.32	4%	3,723.20	46.50	96,728.32	-	-	Dues
55	2151	Leone	Carol	38.46	80,000.96	39.75	82,680.00	3%	2,679.04	40.05	83,308.16	628.16	-	Dues
56	2151	Li	Karen	44.71	93,005.12	47.40	98,585.76	6%	5,580.64	47.40	98,585.76	-	-	Dues
57	2151	Lorenz	Kristine	33.55	69,773.60	34.89	72,564.96	4%	2,791.36	34.89	72,564.96	-	-	Fee
58	2151	Martin	Teresa	31.42	65,345.28	32.67	67,957.76	4%	2,614.56	32.67	67,957.76	-	-	Dues
59	2151	McGowan	Michael	38.22	79,499.68	39.75	82,680.00	4%	3,190.72	39.75	82,680.00	-	-	Dues
60	2106	McGrath	Donald	84.14	175,000.80	87.50	182,000.00	4%	6,999.20	87.50	182,000.00	-	-	Dues
61	2151	McManus	Kathleen	42.53	88,452.00	44.25	92,033.76	4%	3,581.76	44.25	92,033.76	-	-	Dues
62	2151	Mendez	Luis	29.05	60,417.76	29.92	62,229.44	3%	1,811.68	29.92	62,229.44	-	-	Dues
63	2151	Mercer	Mark	35.34	73,503.04	36.75	76,446.24	4%	2,943.20	36.75	76,446.24	-	-	Dues
64	2151	Mesch	Peter	32.67	67,957.76	33.98	70,676.32	4%	2,718.56	33.98	70,676.32	-	-	Dues
65	2106	Morris	Christopher	80.99	168,457.12	84.23	175,194.24	4%	6,737.12	84.23	175,194.24	-	-	Dues
66	2151	Mulcahy	Robert	63.64	132,371.20	66.19	137,668.96	4%	5,297.76	66.19	137,668.96	-	-	Dues
67	2151	Neumeyer	Michael	46.15	95,996.16	48.36	100,595.04	5%	4,598.88	48.36	100,595.04	-	-	Dues
68	2151	Nicholas	Marie	34.71	72,188.48	35.75	74,353.76	3%	2,165.28	35.75	74			

Exhibit 2

From: <Kristine.Wilkes@lw.com>
To: <FSainz@san Diego.gov>
Date: 6/13/2007 9:40:41 AM
Subject: RE: McGuigan--Settlement of Plaintiffs' Counsel's Attorney's Fees

Yes, Mike Aguirre and Don McGrath both, subject to Council approval and input from your office and Jay Goldstone.

-----Original Message-----

From: Fred Sainz [mailto:FSainz@san Diego.gov]
Sent: Wednesday, June 13, 2007 9:38 AM
To: Wilkes, Kristine (SD)
Subject: Re: McGuigan--Settlement of Plaintiffs' Counsel's Attorney's Fees

Thanks for the email. You wrote that the city attorney has approved this. Does that mean Mike personally?

→ >>> <Kristine.Wilkes@lw.com> 6/13/2007 8:50 AM >>>
ATTORNEY CLIENT PRIVILEGED COMMUNICATION

Fred, as you may recall, McGuigan is Michael Conger's lawsuit against the City for underfunding the pension system, which we settled a few months ago with an agreement that the City would pay \$173 million into SDCERS (\$100 million of tobacco money already paid, plus \$73 million over the next five years). That settlement was approved and judgment was entered. Since then, we have been litigating plaintiffs' attorneys' fees claim. We obtained an award of only \$1 (one) dollar in an arbitration by Judge McCue, but plaintiffs' counsel has moved to set aside that award for non-disclosures of the arbitrator's conflicts of interest. We are spending a lot of money on trying to enforce the arbitration award and litigating the fee issue and we believe that there is a good chance the arbitrator's award will be set aside by the Court, and that the Court may differ from the arbitrator and that the judge will award a substantial amount of fees to Conger--probably over \$2 million and possibly much more.

We have reached a tentative settlement with Conger that is beneficial to the City in that the fee amount is relatively low, it can be paid over time if we wish, and the fee amount will not have to be paid out of new money in the budget, but can be satisfied out of the \$73 million obligation the City already owes to SDCERS.

We believe that SDCERS will agree to this arrangement (their counsel is recommending it), and the City Attorney has approved it. We will be presenting it to Council, as well.

I want to make sure it is acceptable to the Mayor, however, because the attorneys' fees payment will reduce the amount going into SDCERS funding--in other words, while SDCERS will agree to allow the City to pay the attorneys' fees award out of the \$73 million owed under the McGuigan settlement, SDCERS will give the City credit towards SDCERS funding only on the net amount SDCERS receives (i.e. \$73 million less the fee payment to Conger).

The proposed settlement is for \$1.6 million in attorneys' fees

(Conger's actual fee claim is \$2.3 million for hours worked times hourly rate, and he has sought a multiplier on that number (as the law allows) for a claim of up to \$25 million in fees). The City can pay the \$1.6 million either in a lump sum of \$1.6 million in 2008 (out of the money already committed to pay to SDCERS in the budget), or in four payments of \$400,000 (without interest) over the next four years (again out of the money already committed to pay to SDCERS under McGuigan settlement).

I want to Mayor to be aware of and support this resolution because I know you have publicly committed to paying down ARC plus and this amount would come out of the "plus." The benefits are that we (1) avoid substantial additional litigation expense in McGuigan (the attorney fee battle is going to involve a fair amount of additional discovery and motion practice); (2) avoid the risk of a large fee award by the Court (and we would have to pay Conger's fees in fighting about fees, as well as the City's); (3) no new budget impact is felt (we wouldn't need to find new money for this); and (4) the system can afford this payment out of the City's contribution because the \$73 million was actually an overpayment once the most recent numbers came out on SDCERS funding needs.

This will still require approval by the Court (and Council), but please advise me at your earliest convenience if the Mayor's Office has any opposition to this resolution, or if you would like more information. Please forward this to Kris or Julie as appropriate.

Best regards, Kris

Kristine L. Wilkes

LATHAM & WATKINS LLP
600 West Broadway, Suite 1800
San Diego, CA 92101-3375
Direct Dial: +1.619.238.2879
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Latham & Watkins LLP

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Latham & Watkins LLP

Exhibit 3

1 MICHAEL J. AGUIRRE, City Attorney
DON McGRATH, II, Exec. Asst. City Attorney. (CA Bar No. 44139)
2 WALTER C. CHUNG, Deputy City Attorney (CA Bar No. 163097)
3 Office of the City Attorney
1200 Third Avenue, Suite 1620
San Diego, California 92101-4100
4 Telephone: (619) 533-5800
Facsimile: (619) 533-3201
5 Attorneys for Defendants and Cross-Complainants
SAN DIEGO CITY ATTORNEY MICHAEL J.
6 AGUIRRE AND CITY OF SAN DIEGO

Exempt from fees per Gov't Code § 6103.
To the benefit of the City of San Diego.

7
8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF SAN DIEGO**

10 SAN DIEGO CITY EMPLOYEES'	) Case No. GIC841845
11 RETIREMENT SYSTEM,	) [Consolidated with Cases No. GIC851286
	) and GIC 852100]
12 Plaintiff,)
13 v.)
14 SAN DIEGO CITY ATTORNEY MICHAEL J.	) CITY OF SAN DIEGO'S PHASE III
15 AGUIRRE; THE CITY OF SAN DIEGO and	) TRIAL STATUS REPORT AND
16 DOES 1-100,	) MEMORANDUM IN SUPPORT OF
	) MOTION TO STAY TRIAL PENDING
17 Defendants.	) APPEALS OR, IN THE ALTERNATIVE,
	) FOR A HEARING <i>IN LIMINE</i> AS TO
	) RES JUDICATA AND OTHER CITY
	) DEFENSES
)
	) Date: August 21, 2007
	) Time: 8:30 a.m.
	) Dept.: 69
18 AND OTHER RELATED ACTIONS	) I/C Judge: Hon. Jeffrey B. Barton
	) Action filed: January 27, 2005

19
20 I.

21 **INTRODUCTION**

22 The City of San Diego ("City") repeatedly has been sued for, and has settled, claims
23 relating to its alleged underfunding of the City employees' pension system arising out of MP 1
24 and MP 2. [As a result of those litigations, the City is obligated to make (and is making)
25 payments to restore the San Diego City Employees' Retirement System ("SDCERS" or "pension
26 system") funding to the actuarially-required level. Specifically, as a result of judgments in prior
27
28

✓✓
1 cases (*Gleason* and *McGuigan*),¹ the City has provided SDCERS with real property security in
2 the amount of \$475 million, has committed to make additional cash funding infusions to
3 SDCERS of \$173 million (*McGuigan*), and is required to make required contributions (ARC) to
4 SDCERS annually from 2006 forward (*Gleason*). Indeed, the Mayor's current budget provides
5 for payments of "ARC-plus," infusing the pension system with payments of over \$20 million
6 above ARC in FY 2008 alone.]

→
7 In the face of these judgments, SDCERS is pursuing the exact same claims previously
8 litigated and resolved, and seeks to try alleged underfunding arising from MP 1 and MP 2. The
9 prior litigation acts as a bar to SDCERS current compulsory cross-complaint, or at the very least,
10 offsets the damages now claimed by SDCERS. Therefore, rather than an immediate trial,
11 SDCERS' duplicative underfunding claim should be stayed pending resolution of several appeals
12 or, alternatively, the Court should entertain the City's *in limine* motions, which defeat SDCERS'
13 underfunding claim as a matter of law.

14 II.

15 FACTUAL BACKGROUND

16 In claims identical to those alleged by SDCERS here, the City has been subject to
17 multiple lawsuits alleging underfunding of the pension system.

18 A. The *Gleason* Litigation

19 In 2003, the City was sued in *Gleason*. That lawsuit raised the identical allegations to
20 those currently asserted by SDCERS, *i.e.*, that the City underfunded the pension system from
21 1996 to the present by adopting MP 1 and MP 2. (Exhibit 1 to the contemporaneously filed
22 Notice of Lodgment). The City settled *Gleason* in 2004, in an agreement and judgment *to which*
23 *SDCERS was a party*. (Exhibits 2 and 3 to the contemporaneously filed Notice of Lodgment).
24 In that settlement, the class plaintiffs released all claims against the City arising out of alleged
25 pension underfunding asserted in the *Gleason* complaint. (Exhibit 2 at 11-12 at ¶ 3(e); *Id.* at 13
26

27 ¹ *Gleason v. San Diego City Employees' Retirement System, et al.*, San Diego Superior Court
28 Case No. GIC 803779 (Hon. Patricia Cowett) ("*Gleason*"); *McGuigan v. City of San Diego*, San Diego
Superior Court Case No. GIC 849883 (Hon. Richard E.L. Strauss) ("*McGuigan*").

¶¶ 4-5). In return, the City agreed to make specified payments to SDCERS from 2006 to 2008, and to thereafter make the ARC payments to SDCERS. (*Id.* 5-8, ¶ 3(a)). SDCERS is the third party beneficiary of the *Gleason* settlement, receiving all monetary contributions to the pension system under the judgment and \$375 million in real property collateral. (*Id.* at 5-8 ¶ 3(a)).

B. The McGuigan Litigation

In 2005, the City was sued in *McGuigan*, which again alleged underfunding of SDCERS in violation of Charter Section 143, from 1996 to the present, as a result of MP 1 and MP 2. (Exhibit 4 to the contemporaneously filed Notice of Lodgment). On the eve of cross-motions for summary judgment, in which the City showed that *McGuigan* was precluded under *res judicata* by the *Gleason* judgment, the parties settled *McGuigan*. (Exhibits 5 and 6 to the contemporaneously filed Notice of Lodgment). Because the City was committed to increasing funding to SDCERS in all events, the City agreed to pay to SDCERS \$173 million over five years. (Exhibit 5 at 4-6). That amount consisted of \$100 million in tobacco securitization proceeds, which were paid to SDCERS in June of 2006, plus an additional \$73 million to be paid to SDCERS over the next five years, secured by \$100 million in additional collateral. (*Id.*) To ensure that the City was never again sued for underfunding of the pension system arising out of MP 1 and MP 2, *McGuigan* was a non-opt out class action, and the releases barred *all SDCERS beneficiaries and their representatives* from bringing future underfunding claims as alleged in *McGuigan*.²

² See Exhibit 5 at 10-11, "each member of the Settlement Class, together with their beneficiaries, representatives, children, heirs, successors in interest and assigns, hereby release, discharge and dismiss with prejudice the City, from any and all claims or causes of action that arise from the facts alleged in the Complaint, filed June 28, 2005, the First Amended Complaint, filed September 6, 2005, and the Second Amended Complaint. Those claims are: (a) that the *City violated former Charter section 143* ... (d) for declaratory relief that the City underfunded the SDCERS pension system and must pay additional amounts, plus interest, to rectify such underfunding; and (e) *for a peremptory writ of mandate directing the City to pay SDCERS the amount of the City's shortfall in employer contributions from 1996-2006.*" [emphasis added].

SDCERS was fully aware of *McGuigan*. Counsel for SDCERS filed a declaration in *McGuigan*, recognizing that the *McGuigan* claims are "the same" as SDCERS' claims in this case.³

In his judgment approving the *McGuigan* settlement, San Diego Superior Court Judge Richard Strauss found that the City was *overpaying* its SDCERS underfunding liability with that settlement.⁴ The City already has paid over \$127 million to SDCERS under the settlement, and has conveyed the trust deeds, on which SDCERS is the named beneficiary, providing \$100 million in collateral to SDCERS (above the \$375 million in *Gleason*). (Exhibit 7 to the contemporaneously filed Notice of Lodgment).

C. The Federal POA Litigation

After *McGuigan* was filed, the San Diego Police Officers' Association (POA) amended its federal court complaint against the City to copy the *McGuigan* underfunding claim, i.e., alleging that the City's failure to fund the pension system adequately as a result of MP 1 and MP 2 violated City Charter Section 143. On June 26, 2007, the federal court dismissed the POA's state court claims (including the POA's underfunding claim) as properly brought in this Court.⁵ The POA has appealed that ruling to the Ninth Circuit, and has also appealed the *McGuigan* judgment to the state appellate court.

///

///

³ See Exhibit 7, Decl. of Reginald Vitek dated June 2, 2006, in which he declares, "I am familiar with the First Amended Complaint filed in the case of *McGuigan v. City of San Diego*, which alleges that the City violated Section 143 of the San Diego City Charter . . . by paying less than the actuarially required amounts due from the City to SDCERS SDCERS, by way of a compulsory cross-complaint filed in the SDCERS action (GIC 841845), and attached hereto as Exhibit 1, is pursuing the same claims stated by McGuigan in his First Amended Complaint." [emphasis added].

⁴ See Exhibit 8 at 9, "the Court finds that the value of the Pension Underfunding Claims is between \$140 million and \$158.9 million. The consideration the City has agreed to pay SDCERS on behalf of the class—\$173 million—is *more than fair, adequate, and reasonable.*" [emphasis added].

⁵ Exhibit 9, POA Order, attached to the contemporaneously filed Notice of Lodgment, at 14-15: the "cases consolidated before Judge Jeffrey Barton in San Diego Superior Court between SDCERS and the City involve matters related to the issues in this case, such as levels of pension funding [G]iven that the state courts are presently addressing issues related to those raised in this suit, dismissal of Plaintiff's state claims without prejudice is especially appropriate."; *Id.* at 16.

1 **D. SDCERS' Duplicative Underfunding Claims in this Case**

2 SDCERS filed its counter-claim on March 24, 2006, long after *Gleason* settled and nearly
3 a year after *McGuigan* was filed. SDCERS' allegations are identical to the underfunding
4 allegations made and settled by the class of plaintiffs (SDCERS beneficiaries and their
5 representatives) in *Gleason* and *McGuigan*. For example, in *Gleason*, the plaintiffs alleged in
6 their complaint that:

7 30. Beginning with its fiscal year from July 1, 1996 to June 30, 1997, and in
8 each and every fiscal year since, the City has failed and refused to
9 contribute the amount to CERS [SDCERS] as required by City Charter
10 article IX, section 143

11 (Exhibit 1 at 5).

12 The claims included "whether the City has violated the City Charter by failing to fund its
13 retirement plan as required by ... section 143 of the City Charter." Likewise, in *McGuigan*
14 plaintiffs alleged:

15 20. Beginning with its fiscal year from July 1, 1996, to June 30, 1997, and in
16 each and every fiscal year until June 30, 2005, the City failed and refused
17 to contribute amounts to SDCERS required by the Charter.

18 (Exhibit 4 at 4-5)

19 *McGuigan* sought relief *on SDCERS' behalf*. (*Id.* at 5, ¶¶ 31-32 (this action is "brought
20 in a representative capacity *on behalf of SDCERS* and its members and *any recovery in this*
21 *action will be paid to SDCERS*") [emphasis added], and duplicated the *Gleason* prayer for relief,
22 seeking "damages *payable to SDCERS in the amount of underfunding, with* interest, since
23 1996." *Id.* at 9, ¶ 1 [emphasis added]).

24 SDCERS' cross-complaint in this case alleges identical wrongdoing by the City:

25 33. **Charter section 143** requires the City to "contribute
26 annually an amount substantially equal to that required of the
27 employees for normal retirement allowances, as certified by the
28 actuary"

 34. **During fiscal year 1997 through fiscal year 2003** the City
failed to perform its obligations and contributions to SDCERS the
full amounts owed and pursuant to Section 143.

(Exhibit 8 to the contemporaneously filed Notice of Lodgement at 6-7 [emphasis added]).

SDCERS seeks the same relief already sought in *Gleason* and *McGuigan*: “SDCERS prays that ... [t]he City be order to pay SDCERS all monies that would have otherwise been owed but for the adoption of MP I and MP II (Exhibit 8 at 8).

III.

LEGAL DISCUSSION

E. Further Trial of This Case Should Be Stayed Pending Three Appeals: From this Court’s August 3 Order, in *McGuigan* and in the *POA* Case

Three related appeals warrant a stay of these proceedings.

1. The City’s Appeal From the August 3 Demurrer Order

First, absent modification or reconsideration based on new law,⁶ the City intends to appeal the Court’s Order sustaining Intervenor’s Demurrer to the Sixth Amended Cross-Complaint without leave to amend, which is immediately appealable. (*See, e.g., Justus v. Atchison*, 19 Cal. 3d 564, 568 (1977), *overruled on other grds. in Ochoa v. Super. Ct.*, 39 Cal. 3d 159, 171 (1985), demurrer sustained without leave to amend as to some parties in multi-party action properly appealed; judgment which leaves no issue to be determined as to one or more parties immediately appealable; *Herrscher v. Herrscher*, 41 Cal. 2d 3001, 303-304 (1953), order of dismissal of cross-complaint immediately appealable where parties to cross-complaint not identical with parties to original action; *First Security Bank of California v. Paquet*, 98 Cal. App. 4th 468, 473-75 (2002), order sustaining demurrer on counterclaim without leave to amend immediately appealable).⁷

Once that appeal is filed, it will automatically stay further proceedings in this Court as to matters embraced in or affected by the order appealed, and this Court will be divested of

⁶ Plaintiff in *Brandenburg v. Eureka Development Agency*, 152 Cal. App. 4th 1350 (2007), has petitioned for review (Cal. S. Ct. No. S155212), and the City has requested depublication.

⁷ The contrary assertion in SDCERS’ Phase III Status Conference Brief (“SDCERS Brief”), at 3 n.3, is simply wrong. Compare J. Eisenberg, *et al.*, *California Practice Guide: Civil Appeals and Writs*, ¶¶ 2:91-2:103 (Rutter 2006) (discussing non-final orders that are appealable, including orders on pleadings, such as an order “striking or dismissing a cross-complaint when the parties to the cross-complaint are not the same as the parties to the original action (*e.g.* cross-complaint is against a codefendant or third party.”)). Indeed, the City has no choice but to file an appeal from the demurrer Order because otherwise the City runs the risk that a later appeal after final judgment might be found untimely. *See, e.g., Millsap v. Federal Express Corp.*, 227 Cal. App. 3d 425, 430 n.2 (1991).

jurisdiction to act on matters embraced in or affected by the appealed order. (See Cal. Civ. Proc. Code § 916(a), “the perfecting of an appeal stays proceedings in the trial court upon the judgment order appealed from or upon matters embraced therein or affected thereby”; *Varian Med. Systems, Inc. v. Delfino*, 35 Cal. 4th 180, 189, 196-98 (2005); *Dowling v. Zimmerman*, 85 Cal. App. 4th 1400, 1427-28 (2001); *Civil Appeals and Writs*, ¶ 7:2 at 7-1).

This Court has broad discretion to enter a stay prior to the filing of the notice of appeal. (See Cal. Civ. Proc. Code § 918; *Civil Appeals and Writs*, ¶¶ 7:62-7:63 at 7-21; *Id.*, ¶¶ 7:64-7:65). A stay should be entered because the outcome of the City’s Gov’t Code § 1090 appeal is critical to the remaining case. As SDCERS notes, “[t]he Court [has] ruled that . . . the amount of damages recoverable under SDCERS’ compulsory cross-complaint depended on whether the City’s challenge to the enforceability of pension benefits succeeded” (SDCERS’ Brief at 2). Because this Court has held that resolution of the Gov’t Code § 1090 issue is a predicate to any claim by SDCERS relating to the funding status of the system, trial should not proceed until the threshold Gov’t Code § 1090 issue is resolved on appeal.

2. The McGuigan Appeal

A separate and independent ground for staying the SDCERS trial is the *McGuigan* appeal filed by the POA. The *McGuigan* settlement and judgment, which was a non-opt out class action, is binding on all *McGuigan* class members, consisting of SDCERS beneficiaries *and their representatives, such as SDCERS*. (Exhibit 5 at 10-11). Because the *McGuigan* judgment will bar SDCERS’ underfunding claims once final, a stay pending that appeal is warranted.⁸

3. The POA Appeal

A third independent reason for staying the trial of SDCERS claims is the *POA* litigation. As matters now stand, the POA, if it wishes to pursue its underfunding (or other state law

⁸ See *First N.B.S. Corp. v. Gabrielson*, 179 Cal. App. 3d 1189, 1195 (1986), when judgment becomes final during pendency of another action, it may be raised as *res judicata*. See also *People ex rel. Garamendi v. American Autoplan, Inc.*, 20 Cal. App. 4th 760, 769-71 (1993), “The rule [of exclusive concurrent jurisdiction] is based upon the public policies of avoiding conflicts that might arise between courts if they were free to make contradictory decisions or awards relating to the same controversy, and preventing vexatious litigation and multiplicity of suits.”; second duplicative case must be stayed.

1 pension) claims, must do so in this lawsuit, but the POA has appealed that decision. Trial should
2 not proceed here until the predicate POA party issue is resolved.

3 **F. If this Case Proceeds, the Court Should Set a Hearing Date on the City's**
4 **Dispositive Motions *In Limine***

5 If the Court opts to proceed to trial now as to SDCERS' remaining claims, the Court
6 should hear the City's motions *in limine* before trial. Such motions *in limine* will eliminate
7 pretrial the remaining claims, which fail as a matter of law. (See, e.g., *Clemens v. American*
8 *Warranty Corp.*, 193 Cal. App. 3d 444, 451-52 (1987), "A defendant may object to the
9 introduction of . . . evidence by a plaintiff who has failed to state a cause of action.... In making
10 such motion, the objecting party *seeks to end the trial* and obtain a favorable judgment").⁹

11 **1. SDCERS' Underfunding Claims are Doubly Barred under Res**
12 **Judicata**

13 While a full explication is beyond the scope of this brief, the City will show in advance of
14 trial that SDCERS' underfunding claim is barred by the *Gleason* and *McGuigan* judgments
15 under *res judicata* (e.g., *Border Business Park, Inc. v. City of San Diego*, 142 Cal. App. 4th
16 1538, 1563 (2006)) or at the very least are an offset to damages now claimed by SDCERS in this
17 action.

18 **a. The *Gleason* Judgment Bars SDCERS' Underfunding Claims**

19 Given the rulings previously made in this case, claim preclusion bars SDCERS'
20 underfunding claims based on the *Gleason* settlement and judgment. The law of this case to date
21 is the Court's Phase I Statement of Decision, which held that the City was barred from litigating
22 against codefendant SDCERS not only the underfunding issues that were raised in *Gleason*, but
23 all MP 1 and MP 2 issues (e.g., Gov't Code § 1090). Applying this rule, if this Court wishes to

24 ⁹ See also San Diego Superior Court Local Rule 2.1.18, "Motions *in limine* must be limited in
25 scope in accordance with *Clemens v. American Warranty Corp.* (1978) 193 Cal. App. 3d 444, 451."; *Edwards v. Centex Real Estate Corp.*, 53 Cal. App. 4th 15 (1997); *Mech. Contractors Ass'n v. Greater*
26 *Bay Area Ass'n of Plumbing & Mech. Contractors*, 66 Cal. App. 4th 672, 676-77 (1998), motion *in limine*
27 may function as an objection to all the evidence, which is the same as a general demurrer or motion for
28 judgment on the pleadings, or such motion may operate as the functional equivalent of a nonsuit; *Ladas v.*
Cal. State Auto. Ass'n, 19 Cal. App. 4th 761, 767, 770 (1993), trial judge properly granted motion *in*
limine and entered judgment in favor of defendant after conducting full evidentiary hearing on *in limine*
motion.

1 be uniform in its application of the law, if SDCERS wished to bring its own underfunding claim,
2 that, too, was a compulsory cross-claim in *Gleason*, and SDCERS is now barred from asserting
3 not only underfunding claims that were raised in the *Gleason* case, but any that could be raised,
4 which include SDCERS' claims here. (e.g., *Lincoln Property Co., N.C., Inc. v. Travelers Indem.*
5 *Co.*, 137 Cal. App. 4th 905, 912-13 (2006)).

6 While the City respectfully disagrees with the Court's Phase I ruling and will challenge it
7 on appeal, that challenge does not affect the result here because (1) the Court should apply its
8 rulings equally to all parties until reversed or reconsidered,¹⁰ and (2) underfunding, unlike the
9 Gov't Code § 1090, *was a claim at issue in Gleason*, making it more appropriate for SDCERS
10 than the City to be bound to the *Gleason* judgment.

11 **b. The McGuigan Settlement and Judgment Bar SDCERS'**
12 **Underfunding Claims as a Matter of Law under Contract and**
Res Judicata Principles

13 SDCERS is also precluded from relitigating its underfunding claim in this case given the
14 *McGuigan* settlement and judgment. First, there is an identity of claims: SDCERS is asserting
15 the identical underfunding claim resolved in *McGuigan*.¹¹ Second, there is an identity of parties
16 or privies: As the lawful fiduciary of the pension beneficiaries, and the third party beneficiary
17 under the settlement and judgment, SDCERS is in privity with the class which settled
18 *McGuigan*,¹² and SDCERS was a named party in the non-opt out *McGuigan* settlement and
19 judgment, which extends the class definition to SDCERS beneficiaries and their

20
21 ¹⁰ Although on appeal and subject to an automatic stay, an appealed order remains effective for
22 purposes of controlling non-stayed trial court proceedings. (*McFarland v. City of Sausalito*, 218 Cal. App.
23 3d 909, 912 (1990); *Civil Appeals and Writs*, *supra*, ¶ 7.2.1 at 7-1).

24 ¹¹ SDCERS Brief, at 3-4, confirms this identity of issues: "the only remaining operative pleading
25 ... is SDCERS' compulsory cross-complaint to recover sub-actuarial pension contributions from the
26 City". See also Ex. 2 (SDCERS Compulsory Cross-Complaint (dated March 24, 2006) ¶ 14, "MP I ...
27 allowed the City to contribute less funds than what was actuarially required pursuant to Charter Section
28 143 by promising that retirement benefits certain members of the Former Board ... would be entitled to
receive would be increased"; *Id.* ¶ 19, "MP II ... allowed the City to continue to contribute less funds than
what was actuarially required pursuant to Charter Section 143 and eliminate the safeguard balloon
payment, by promising that additional retirement benefits for certain members of the Former Board ...
would be increased".

¹² See *Babbitt v. Babbitt*, 44 Cal. 2d 289, 297 (1955); *Citizens for Open Access v. Seadrift Ass'n*,
60 Cal. App. 4th 1053, 1070-71 (1998).

1 “representatives.” (Exhibit 5 at 1, 4, 10-11.¹³) Third, the *McGuigan* judgment is sufficiently
2 firm to be afforded conclusive effect for purposes of issue preclusion, and once the *McGuigan*
3 appeal is concluded, the judgment will operate to bar all underfunding claims, including those
4 which were or could have been raised in that case. (See *Mycogen Corp. v. Monsanto Co.*, 28 Cal.
5 4th 888, 898-99 (2002), prior declaratory relief action which contained claim for coercive or
6 damages relief operates as *res judicata* barring subsequent suit for damages; *Frazier v. City of*
7 *Richmond*, 184 Cal. App. 3d 1491, 1498 (1986)).¹⁴

8 In sum, given the *res judicata* effect of the earlier underfunding lawsuits, the judgments
9 in the earlier actions extinguish SDCERS’ remaining causes of action so there is nothing here
10 left to sue upon, *even if this suit were based upon a different theory or sought a different*
11 *remedy.* (e.g., *Crowley v. Katleman*, 8 Cal. 4th 666, 681-82 (1994); *Weikel v. TWC Reality Fund*
12 *II Holding Co.*, 55 Cal. App. 4th 1234, 1250 (1997); *see generally*, R. Weil, *et al.*, *California*
13 *Practice Guide: Civil Procedure Before Trial*, ¶ 6:261 (Rutter 2007)). Here, of course,
14 SDCERS’ claims are precisely the same.¹⁵

15 2. SDCERS’ Claims are Barred by the Statute of Limitations

16 The City will also show *in limine* that SDCERS’ claims are barred by the statute of
17 limitations. To prove its underfunding case, SDCERS must prove the amount by which the
18

19 ¹³ By law and its own admission, SDCERS is a representative of the SDCERS beneficiaries;
20 indeed, SDCERS is a *fiduciary* of those beneficiaries. Moreover, SDCERS has willingly accepted the
21 benefits of the settlement: accepting the initial \$100 million payment under the judgment, and accepting
22 additional payment to SDCERS made in FY 2008 under the settlement’s terms and the trust deeds
23 assigning SDCERS real property collateral to secure the City’s remaining payment obligation.

24 ¹⁴ See also *Dosier v. Miami Valley Broad. Corp.*, 656 F.2d 1295, 1298-99 (9th Cir. 1981), party
25 to consent judgment bound despite absence of opportunity to opt out; *Citizens for Open Access etc. Tide,*
26 *Inc. v. Seadrift Assn.*, 60 Cal. App. 4th 1053, 1065, 1067 (1998), a judgment of dismissal entered pursuant
27 to a settlement agreement is final and acts as *res judicata* to any future actions on the same controversy.

28 ¹⁵ SDCERS’ only response to the plain *res judicata* effect of these prior judgments is to assert
that, as to *McGuigan*, SDCERS was “not a party,” and that *Gleason* “addressed different underfunding
issues from those at issue here.” (SDCERS Brief at 5). As to the first point, in reality, SDCERS is a party
to the *McGuigan* settlement and judgment—SDCERS is a named class member as the “representative” of
its members and beneficiaries, and SDCERS is bound under privity in all events. As to the second point,
it is obvious that *Gleason* addressed the same underfunding alleged by SDCERS here—*Gleason* broadly
challenged all failure by the City to fund at the actuarially required rate—precisely the claim asserted
here. (e.g., Ex. 1 at 5 (¶ 30) (*Gleason* complaint); Ex. 2 at 13, ¶ 4 (*Gleason* settlement); compare Ex. 8 at
6-7, ¶¶ 33-35.)

1 pension system is allegedly underfunded by asserting a violation of statute. Accordingly, the
2 longest potential statute of limitations would be three years under California Code of Civil
3 Procedure 338(a)—more likely the applicable statute is one year, (*see* Cal. Civ. Proc. Code §
4 342, action against public entity). Since SDCERS plainly has had knowledge of alleged
5 underfunding at least since *Gleason* was filed on January 16, 2003, and since SDCERS did not
6 file its cross-complaint until March 24, 2006, its claims are time-barred.

7 3. SDCERS' Claims are Barred by the Government Claims Act

8 Pursuant to the Government Tort Claims Act, "no suit for money or damages may be
9 brought against a public entity on a cause of action for which a claim is required to be presented
10 ... until a written claim therefor has been presented to the public entity and has been acted upon
11 by the board, or has been deemed to have been rejected by the board" (Cal. Gov't Code §
12 945.4; *see also, Id.* § 905). As relevant here, a claim must be presented within one year of its
13 accrual. (Cal. Gov't Code § 911.2). If a party fails to timely present a written claim in
14 compliance with the Act, the party's causes of action are barred completely. (*See, e.g.,*
15 *Sappington v. Orange Unified Sch. Dist.*, 119 Cal. App. 4th 949, 955 (2004), affirming trial
16 court's judgment of dismissal of claims for money damages based on denial of purportedly
17 vested health benefits because the plaintiffs failed to comply with the claims presentation
18 requirements of the Act.) Because SDCERS has not satisfied the statutory claims presentation
19 requirements of the Act (which it does not even allege), each of the remaining claims is entirely
20 barred.

21 4. SDCERS' Claims Are Barred By Its Unclean Hands and Admitted 22 Breach of Fiduciary Duty

23 SDCERS' claims are also barred as a matter of law by SDCERS' unclean hands and
24 breaches of fiduciary duty. SDCERS admits such breach. (SDCERS' Brief at 4, "SDCERS'
25 former Board members had a fiduciary duty to properly administer the assets of the retirement
26 system to ensure prompt delivery of pension benefits to its members and their beneficiaries . . .
27 *[T]he former Board members breached this duty.*" [emphasis added].¹⁶)

28 ¹⁶ SDCERS admittedly had the highest statutory fiduciary duty to protect the beneficiaries'
interests, and that duty eclipsed any obligation it owed to the City. Cal. Const., Art. XVI, § 17. *See also*

1 Given that the SDCERS Board held the highest fiduciary duty to SDCERS members
2 and beneficiaries, its admitted breach of that duty—which was the direct cause of the damages it
3 alleges (*i.e.*, underfunding of the pension system)—constitutes unclean hands and bars its
4 recovery as a matter of law. (*See, e.g., Peregrine Funding, Inc. v. Sheppard Mullin Richter &*
5 *Hampton LLP*, 133 Cal. App. 4th 658, 679-82 (2005), unclean hands defense could prevail on
6 pleadings where plaintiff's admission establishes defense; innocent trustee's claims barred by
7 wrongdoing of predecessor; *Blain v. Doctor's Co.*, 222 Cal. App. 3d 1048, 1058 (1990), unclean
8 hands barred recovery where that conduct was direct cause of injury alleged; *Pond v. Ins. Co. of*
9 *N. Am.*, 151 Cal. App. 3d 280 289-90, 292 (1984), unclean hands applies to suits in law as well
10 as equity and may be summarily decided as a matter of law; "The [unclean hands] rule is settled
11 in California that whenever a party who, as actor, seeks to set judicial machinery in motion and
12 obtain some remedy, has violated conscience, good faith or other equitable principle in his prior
13 conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to
14 interfere on his behalf to acknowledge his right, or to afford him any remedy."; *French v. Constr.*
15 *Lab. Pension Trust*, 44 Cal. App. 3d 479, 492-93 (1975) (unclean hands precluded recovery of
16 pension benefits.)¹⁷

17 ///

18 ///

19
20 SDCERS Verified Complaint for Declaratory Relief (filed January 27, 2005) Exhibit 8 at ¶¶ 19-20
21 ("Pursuant to California Constitution, Article XVI, section 17, the Board is vested with the sole and
22 exclusive fiduciary responsibility over the assets of the Retirement System" and "to administer the
23 Retirement System in a manner that will assure prompt delivery of benefits and related services to the
24 participants and their beneficiaries"); *Id.* ¶ 54 (alleging interests of City and SDCERS are in conflict as to
matters "in which SDCERS' fiduciary duty to the Retirement System's participants and their beneficiaries
pursuant to California Constitution, Article XVI, section 17(b), take precedence over any duties it may
have to the City, including the duty to minimize employer contributions"); *see also* SDCERS Compulsory
Cross-Complaint (dated March 24, 2006), Exhibit 8 at ¶¶ 10-11.

25 ¹⁷ *See also Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co.*, 324 U.S. 806, 814-15
26 (1945) (unclean hands doctrine promotes justice by making a plaintiff answer for his own misconduct in
the action and by preventing "a wrongdoer from enjoying the fruits of his transgression"); *Kendall-*
27 *Jackson Winery, Ltd. v. Super. Ct.*, 76 Cal. App. 4th 970, 978 (1999); *Katz v. Karlsson*, 84 Cal. App. 2d
28 469, 473 (1948) ("If the record shows upon its face that the moving party has failed to act in good faith
with the court, that is, has instituted a proceeding or motion with unclean hands, it is the duty of a
reviewing court in the interest of justice to determine the propriety of the judgment, decree or order of the
trial court.").

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IV.

CONCLUSION AND RELIEF SOUGHT

There are three pending or imminent appeals that will dictate future proceedings here:

- The City's appeal regarding whether the City's illegal benefits claim is time-barred;
- The POA's appeal in *McGuigan* which, once resolved, will make the *McGuigan* judgment claim preclusive of SDCERS' claims here;
- The POA's appeal in the *POA* case, challenging the federal court's decision that the POA's state pension underfunding claims should proceed in this Court.

Each appeal stands to directly impact the remaining Phase III proceedings, and each appeal is a recent development unknown when the Court entered its original phasing order, and now warranting a stay of this case.

Alternatively, before commencing trial on SDCERS' claims against the City, the Court should schedule briefing and hearing on the City's motions *in limine*, as prior litigated matters which have resulted in settlement agreements and judgments bar the current claims of SDCERS, or at the very least, are an offset to the claimed damages of SDCERS.

Lastly, the City apologizes for exceeding this Court's suggested five page limit for this filing. The City attempted to address all the issues that it felt needed to be addressed for this status conference in as succinct a manner as possible. However, due to the nature of the issues involved, the City was unable to address each and every necessary issue in five pages or less.

Dated: August 16, 2007

MICHAEL J. AGUIRRE, City Attorney


By 
Walter C. Chung, Deputy City Attorney
Attorneys for Defendants/Cross-Complainants

Exhibit 4



DAVID B. WESCOE
Retirement Administrator

March 21, 2007

Honorable Mayor Jerry Sanders
The City of San Diego
202 C Street, MS #11A
San Diego, CA 92101

BY HAND

Dear Honorable Mayor Sanders:

Given your interest in SDCERS' actuarial soundness, I am enclosing the "Expert Report" written by Joseph Esuchanko, who was retained by the City to provide expert testimony in the San Diego Police Officers Association (POA) case against the City, SDCERS and others.

The conclusions Mr. Esuchanko reaches in his Expert Report include the following:

1. "SDCERS is actuarially sound" according to the definition of actuarial soundness used by the U.S. Government Accountability Office. (p. 5)
2. "[SDCERS'] 97.1% funded ratio on this basis meets this definition of actuarial soundness, even though the system is not going to terminate." (p. 6)

[In his Expert Report, Mr. Esuchanko does not use SDCERS' funding ratio of 79.9% to evaluate SDCERS' actuarial soundness because he does not believe it is an appropriate measure to do so. (p. 4) Rather, he uses other definitions of actuarial soundness, including the FASB 35 ratio that focuses on how SDCERS' assets compare to its liabilities if contributions stopped and accrued benefit claims had to be satisfied - basically, what the picture would be if SDCERS closed its doors. Cheiron calculated this ratio in its June 30, 2006 Actuarial Valuation for the City at 98.87% (Cheiron Valuation at p. 36), while Mr. Esuchanko calculated it at 97.1% (Expert Report at p. 5).]

3. "Under the Pension Protection Act of 2006, one of the tests to determine if a plan is 'at-risk' is determining if the funded ratio of assets to present value of accrued benefits falls below 80%, using standard assumptions. At 97.1%, SDCERS is clearly not at risk." (p. 6)

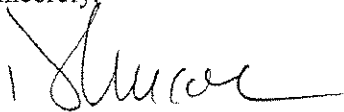
email: dwescoe@sandiego.gov • website: www.sdcers.org

401 B Street • Suite 400 • MS 840 • San Diego, CA 92101 • tel: 619.525.3600 • fax: 619.595.0357

4. "Assuming that the City continues to fund SDCERS with the amounts reported as the ARC in SDCERS actuarial valuation reports and assuming further that such reports are prepared in accordance with generally accepted actuarial methods and assumptions, as was the current actuarial valuation report prepared by the SDCERS actuary for the fiscal year ended June 30, 2008 [the City's June 30, 2006 actuarial valuation prepared by Cheiron], there is no material risk that SDCERS will be unable to pay the pension benefits which the City has agreed to pay its existing retirees, terminees entitled to future benefits and current employees." (p. 7, emphasis added)
5. "Also, it is my understanding that the Board of SDCERS has managed the plan in compliance with the San Diego Municipal Code." (p. 14)
6. "[The POA's actuary] acknowledges that the City is currently funding SDCERS on an actuarially sound basis. I concur with that conclusion." (p. 15)
7. "I disagree with [the POA actuary's] assertion that SDCERS and the City 'conspired to use an unsound scheme to fund certain non-retirement benefits by using investment earnings of the Plan's trust.'...it is quite common in the public sector for retirement systems to provide benefits such as the 13th check out of excess earnings." (p. 16)

If you have any questions about SDCERS, please call me.

Sincerely,



David B. Wescoe

Enclosure

cc: Ronne Froman, Chief Operating Officer
Jay Goldstone, Chief Financial Officer
Kris Michell, Deputy Chief
Fred Sainz, Director of Communications
Julie Dubick, Policy Advisor

Expert Report of Joseph Esuchanko, MAAA, ASA, MSPA, FCA, EA

I. INTRODUCTION

I have been retained by counsel representing the City of San Diego (the "City") to assist counsel and the Court in providing expert testimony regarding the claims of plaintiff San Diego Police Officers Association (the "POA") against the City and its elected officials and employees as alleged in the Third Amended Complaint ("TAC") in this action and to rebut the opinions and assertions of the POA's actuarial expert Rick Mayo.

This report summarizes my professional background and experience, the materials subject to my review and my opinions regarding various issues concerning the City's pension system, as administered by the San Diego City Employees' Retirement System ("SDCERS"), given the information available to me at this time and in accordance with Fed. R. Civ. P. 26(a)(2)(B) and the expert report submitted by the POA's expert Rick Mayo dated March 5, 2007. If I receive additional relevant information, I reserve the right to prepare a supplemental report incorporating this new information.

The opinions and observations presented in this report are based upon work performed by me and others working under my direction and supervision. I have knowledge of the matters stated in this report and could competently testify to them if called upon to do so.

II. QUALIFICATIONS AND TESTIMONY

My curriculum vitae, which summarizes my professional and educational background, is attached hereto at Exhibit A. Attached at Exhibit B, I have included a

listing of the matters wherein I have provided sworn testimony during the last four years. My rate for analysis and testimony is \$360 per hour.

III. DOCUMENTS REVIEWED AND RELIED UPON

In connection with my continuing review and analysis, I have reviewed and relied upon the materials that are summarized in the attached Exhibit C. Additionally, I have had discussions with counsel for the City.

IV. ANALYSIS AND OPINIONS

This report is subject to change based on the review of further discovery, the analysis of additional documents and the review of the expert reports of the POA's expert witnesses.

The City of San Diego's counsel has asked me to review the pleadings in this case and the relevant evidence and express my expert analysis and opinions on actuarial issues raised by the POA's claims in this case and to rebut the opinions of the POA's expert Rick Mayo on actuarial issues.

A. The Actuarial "Soundness" of the San Diego City Employees' Retirement System

- Pursuant to Manager's Proposal One ("MP-1") and Manager's Proposal Two ("MP-2"), during the period July 1, 1996 through June 30, 2004, the City made annual contributions less than the amounts identified as the actuarial required contribution (the "ARC") in SDCERS annual actuarial valuations. Further, pursuant to the Gleason Settlement, during the period July 1, 2004, through June 30, 2005, the City made annual contributions less than the

amount identified as the ARC in the SDCERS June 30, 2003 actuarial valuation.

I have performed an analysis to determine the accumulation of this shortfall of City contributions at June 30, 2006. I first determined the contributions that were paid by the City to SDCERS. Following that, I determined the contributions that would have been paid by the City to SDCERS, assuming that full ARC contributions had previously been paid. This required an intermediate step of determining the rate of return actually earned by the SDCERS trust fund. The difference between the contributions that would have been paid and the contributions that were paid in each year represents the shortfall for that year. Accumulating these individual shortfalls at the rate of return earned by the SDCERS trust fund, I determined the accumulation of the shortfall at June 30, 2006. The result of my analysis is that the accumulated value of the shortfall is \$160 million at June 30, 2006.

- Pursuant to the Gleason Settlement Agreement in July 2004, the City ceased the practice of annual funding at less than the ARC, effective for fiscal year 2006, and secured future payments with a pledge of \$500 million worth of real estate.
- Pursuant to the McGuigan Settlement Agreement, the City agreed to pay \$173 million, plus interest at 7% interest per annum, on or before June 8, 2011, to SDCERS reflecting the difference between

the annual amounts previously paid by the City pursuant to MP-1 and MP-2 and the amounts that were reported by SDCERS as the ARCs during the period fiscal 1997 through fiscal 2005.

In November 2006, the Mayor presented to City Council his Five-Year Financial Outlook for Fiscal Years 2008 – 2012. In it, he stated, "Prior to the end of fiscal year 2006, the City contributed \$108 million into the retirement system to pay down a portion of the UAAL." The "UAAL" is the unfunded actuarial accrued liability. In January 2007, the actuary employed by SDCERS reported that the ARC for fiscal year 2008 is \$137.7 million. At this time it is my understanding that the Mayor intends to contribute in excess of that amount, to pay down an additional portion of the UAAL.

- Based on the latest SDCERS Actuarial Valuation for the City of San Diego, as of June 30, 2006, the "funded ratio" of SDCERS is 79.9%. This represents the ratio of the actuarial value of assets to the actuarial accrued liability (the "AAL"). This rate is not an appropriate measure of actuarial soundness, since its calculation is dependent upon the choice of actuarial method of calculation. The choice of the method is left to the board of the retirement system. One allowable method, the aggregate method, does not even calculate a funded ratio.
- The fiscal year 2008 ARC of \$137.7 million consists of a portion to cover the benefits earned in the fiscal year, approximately \$78.8 million. The remainder of \$58.9 million goes toward amortizing

the UAAL over a remaining period of 27 years. The U.S. Government Accountability Office has said, "The term actuarial soundness is widely used but not clearly defined for public retirement systems. For purposes of this report, we used the following definition: A retirement system is considered actuarially determined if a professionally qualified actuary (1) calculates the present value of the liabilities for future benefits for current participants and their beneficiaries, (2) determines the normal cost and amortization payments for the unfunded actuarial accrued liability over a reasonable period, and (3) has established a method for determining and amortizing experience gains and losses. If, in addition, the plan sponsor has indicated that it has the willingness and sufficient fiscal capacity to pay those ongoing costs, the plan may be considered actuarially sound." By this definition, SDCERS is actuarially sound.

- In the June 30, 2006 actuarial valuation, the SDCERS actuary reports that the market value of assets is \$3,981,931,694, compared to the total present value of vested accrued benefits of \$4,027,247,867. The ratio of these values is 98.9%. I have independently calculated the total present value of all accrued benefits, including those not vested, to be \$4,100,265,629. The ratio of assets to this present value is 97.1%. In 1952, at a panel discussion sponsored jointly by the American Statistical Association, the American Economic Association, the American

Association of University Teachers of Insurance and the Industrial Relations Association, Dorrance C. Bronson, an actuary and author of Concepts of Actuarial Soundness in Pension Planning, stated that some actuaries define an actuarially sound plan as one, "where the employer is well informed as to the future cost potential and arranges for meeting those costs through a trust or insured fund on a scientific, orderly program of funding which, should the plan terminate at any time, the then pensioners would be secure in their pensions and the then active employees would find an equity in the fund assets reasonably commensurate with their accrued pensions for service from the plan's inception up to the date of termination of the plan." The 97.1% funded ratio on this basis meets this definition of actuarial soundness, even though the system is not going to terminate.

- Under the Pension Protection Act of 2006, one of the tests to determine if a plan is "at-risk" is determining if the funded ratio of assets to present value of accrued benefits falls below 80%, using standard actuarial assumptions. At 97.1%, SDCERS is clearly not at risk. A second test requires the plan to be at least 70% funded using worst-case scenario assumptions. In calculating this funded ratio, certain rules are put forth for determining the value of assets, the assumed age at retirement and the interest rate and mortality table to be used to calculate liabilities. Although public sector plans are not subject to this test, I have calculated an

estimate of the interest rate at which SDCERS would fall below 70%. That interest rate is somewhat below 5.5%. The actual rate will be calculated based on a simplified yield curve that will take into account each plan's demographics and has not yet been set.

- Assuming that the City continues to fund SDCERS with the amounts reported as the ARC in SDCERS actuarial valuation reports and assuming further that such reports are prepared in accordance with generally accepted actuarial methods and assumptions, as was the current actuarial valuation report prepared by the SDCERS actuary for the fiscal year ended June 30, 2008, there is no material risk that SDCERS will be unable to pay the pension benefits which the City has agreed to pay its existing retirees, terminees entitled to future benefits and current employees.

B. Retiree Health Benefits – These are so-called "Other Post Employment Benefits ("OPEBs"), which are not considered pension benefits.

- The Government Accounting Standards Board ("GASB") issued Statement No. 43 ("GASB 43") entitled "Financial Reporting for Postemployment Benefit Plans Other Than Pension Plans" in April 2004. GASB issued Statement No. 45 ("GASB 45") entitled "Accounting and Financial Reporting by Employers for Postemployment Benefits Other Than Pensions" in June 2004.

- GASB 43 requires the accrual of OPEB liabilities over the working career of plan members, rather than on a pay-as-

you-go basis. GASB 45 requires the accrual of OPEB expense over the working career of plan members.

- OPEBs include medical, dental, vision, hearing and life insurance benefits. OPEBs are covered by GASB 43 and GASB 45 even if they are included as benefits in a defined benefit pension plan.
- The City is a "phase 1 government," meaning it has total annual revenues in excess of \$100 million. GASB 43 applies to the City for fiscal year 2007, and GASB 45 applies to the City for fiscal year 2008, since the City is a phase 1 government.
- The GASB 43 and GASB 45 accounting standards require a significant number of actuarial calculations. The City will be required to have an OPEB actuarial valuation performed at least biennially, with the first such valuation as of June 30, 2007, determining the AAL as of June 30, 2007, and the ARC for fiscal year 2008. The actuarial valuation will involve choosing an actuarial cost method and actuarial assumptions, which when applied to the City census data will determine the AAL and the ARC.
- An actuarial cost method is essentially a formula for deriving the liabilities. GASB allows the actuary to choose from six acceptable methods.

- Actuarial assumptions are the variables in the formula. They can be characterized as either demographic or economic. Demographic assumptions consider the probability of the occurrence of certain events, such as death, disability or retiring. Economic assumptions consider the rates of such factors as investment return, healthcare cost increases and compensation increases.
- The City census data includes demographic information on currently active employees, retirees and terminated employees if they will be eligible for benefits in the future.
- If assets have been irrevocably placed in a trust for the sole purpose of paying post employment healthcare benefits, the value of such assets must also be considered.
- The ARC consists of two pieces (except in the case of use of the aggregate actuarial cost method, which does not generate an AAL). The first piece is the amount necessary to amortize the UAAL and the second is the amount considered to be the value of the benefits being earned in the current year. The UAAL is the difference between the AAL and the value of the assets.

➤ The ARC does not refer to an actual contribution requirement, but rather to the employer's accrual expense.

- No law, contractual agreement or accounting principle requires the City to provide funding for OPEB other than the pay-as-you-go amount necessary to provide current benefits. There is no requirement for the City to accrue a liability on its balance sheet for the future payment of retiree health benefits. The San Diego Municipal Code, §24.1204, states that if funding for retiree health benefits is not provided by the SDCERS 401(h) fund, it is to be provided by the City directly. Therefore, the absence of 401(h) funding is not a violation of the Municipal Code.
- Few municipalities create an actuarial fund for the payment of retiree health benefits; the systems are typically pay-as-you-go, as the City of San Diego's is currently. At the California State Association of Counties Conference in January 2006, it was reported that less than 10% of public entities currently set aside any money specifically as irrevocable OPEB contributions. If an OPEB plan is funded, the AAL and the ARC will be considerably lower than if the plan is unfunded, due to the proper use of different discount assumptions. In July 2006, for instance, the City and County of San Francisco estimated their AAL to be \$4.95 billion if not funded, but \$3.01 billion if funded. Similarly, their

estimated ARC is \$456 million if not funded, but \$290 million if funded.

- New York City set up a Retiree Health Benefits Trust for the exclusive benefit of the City's retired employees and their dependents to fund the post employment benefits in January 2006. However, the trust initially had no assets, and benefits were being paid on a pay-as-you-go basis. In January 2007, New York Mayor Bloomberg announced that in fiscal year 2008, \$500 million will be contributed to the trust, in order to begin funding OPEB. New York City has chosen early compliance with GASB 43 and 45 and recorded an OPEB obligation in the footnotes to its Comprehensive Annual Financial Report for fiscal year 2006 of \$53.5 billion. No liability appears on New York City's balance sheet.

C. The City's Reduction of the City's Pick Up of Employee Contributions and a Corresponding Reduction in the Salaries of DROP Participants in 2005 and 2006 Did Not Constitute Reductions in Pension Benefits.

- I understand that in the Last, Best and Final Offers imposed by the City on the police after the POA declared impasse in May 2005 and 2006, the City imposed a 3.2% reduction in the salaries of DROP participants, which corresponded to the 3.2% reduction in amount of the so-called pick up by the City of the employees' contribution to SDCERS. The 3.2% reduction in the pick up amount was a reduction from 7.3% to 4.1%.

- Neither of these changes in my opinion constituted a reduction in pension benefits which the employee had been promised. As far back as the June 30, 1985 actuarial valuation, the statement was made that, "through the meet and confer process, members will not be required to contribute on the basis of 'full' rates for a limited period of time" (emphasis added). As recently as June 30, 1991, the same or similar statement appeared in the actuarial valuation. At June 30, 1992, Gabriel, Roeder, Smith & Company became the actuary for SDCERS. While none of their valuations contain this statement, we have no evidence that there was a change in philosophy. For instance, in the June 30, 1998 valuation the comment is made, "We recommend that the City reduction ... for negotiated pick-ups be reviewed in light of the reduction in assumed employee turnover" (emphasis added). I understand these reductions in effect constituted reductions in salary, which are typically an employment term negotiated in meet and confer, and if not agreed upon, imposed by a municipality pursuant to the Meyer Millas Brown Act.

D. Specific Comments Regarding Mr. Mayo's Report - I have reviewed Mr. Mayo's report and have the following critiques and comments:

- In discussing the decrease in the SDCERS funding ratio and the reasons for the decrease, Mr. Mayo neglects to mention the effect of the granting of additional benefits to employees in 1996 and 2002 that accompanied the adoption of MP-1 and MP-2. Those

benefits contributed approximately \$238 million to the UAAL. Mr. Mayo also neglects to mention the effect of the granting of additional benefits to employees in 2000 that accompanied the Corbett Settlement. Those benefits contributed approximately \$207 million to the UAAL.

I have performed an analysis of the events causing the UAAL, currently reported to be \$1.001 billion. I have divided it into eleven major categories, as follows:

Category	Amount (in millions of dollars)*	Percent of Total
July 1, 1996 UAAL	\$224	22%
Benefit Improvements	445	44%
Purchase of Service Credits	124	12%
DROP	37	4%
Waterfall Benefits	220	22%
City Contribution Shortfall	161	16%
Actuarial Assumption Changes	116	12%
Actuarial Method Changes	-49	-5%
Extra Contribution (June 2006)	-106	-11%
Investment Gains	-361	-36%
Other Actuarial Losses	190	19%
Total	\$1,001	100%

- Some amounts include liabilities for Unified Port District and Airport Authority, which were not accounted for separately. These amounts are not significant.

- Mr. Mayo implies that the two most significant factors causing the current UAAL, "have been the management of the pension fund by the Board of the San Diego Employees Retirement System ... and the underfunding of the Plan by the City." As noted above, of the ten factors other than the City contribution shortfall, five have an absolute impact greater than the City contribution shortfall. Specifically, favorable, rather than unfavorable, investment returns since July 1, 1995, have caused a decrease in the UAAL of \$361 million. Also, it is my understanding that the Board of SDCERS has managed the plan in compliance with the San Diego Municipal Code.
- Mr. Mayo refers to a "practice of skimming investment returns." The practice to which he refers is a practice authorized by City Charter and Ordinance O-15353, originally adopted on October 6, 1980, and expanded later, mainly as a result of the Corbett Settlement in 2000 that came to be known as the "waterfall." The waterfall refers to benefits and associated assets which are not valued in the actuarial valuation in determining the AAL, UAAL and ARC. Instead, they are paid out of so-called surplus undistributed earnings, or realized investment returns above the assumed rate of 8%. The waterfall assigns priorities to the uses of these surplus undistributed earnings.

The concept began with the creation of the 13th check, which was designed to provide retirees with supplemental retirement income

to compensate for the effects of high inflation, which had rendered many retirees' benefits inadequate. Retirees were supposed to receive 50% of the undistributed surplus earnings, but in 1983 a cap of \$30 per year of service was placed on the benefit. Subsequent amendments to that cap were made to take into account the retirees who had retired somewhat earlier.

Retiree healthcare premiums became part of the waterfall after the City and its employees stopped contributing to Social Security, beginning in 1983. The premiums were paid out of surplus undistributed earnings through 1992, at which point it was determined that the use of pension assets for this purpose was improper. From fiscal year 1998 through fiscal year 2005, healthcare benefits were again paid from a reserve set up outside the assets held for valuation purposes.

Currently, the 13th check and the 7% increases in retiree benefits awarded as a condition of the Corbett Settlement in 2000 are the primary benefits in the waterfall.

Beginning with the June 30, 2006, actuarial valuation the liabilities and assets associated with the waterfall benefits were valued in determining the AAL, UAAL and ARC.


- In his conclusions, Mr. Mayo acknowledges that the City is currently funding SDCERS on an actuarially sound basis. I concur with that conclusion. But I disagree with his assertion that SDCERS and the City "conspired to use an unsound scheme to

fund certain non-retirement benefits by using excess investment earnings of the Plan's trust." It is true that the City adopted an ordinance that provided for the funding of certain benefits out of realized investment earnings of SDCERS that exceeded the actuarially assumed investment earnings of 8%. But it is quite common in the public sector for retirement systems to provide benefits such as the 13th check out of excess earnings.

V. CONCLUSIONS

The views expressed in this report are those of the author and should not be construed as representing the position of other experts at Actuarial Service Company, P.C.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my belief and that this report was signed on March 19, 2007 at Troy, Michigan.



Joseph Esuchanko
President & Actuary
Actuarial Service Company, P.C.

APPENDIX A

APPENDIX A

Curriculum Vitae

Joseph Esuchanko, MAAA, ASA, MSPPA, FCA, EA

Joseph Esuchanko is the founder and president of Actuarial Service Company, P.C. The firm was founded in 1984 when he left the position of Senior Consultant at Coopers & Lybrand. The client base of Actuarial Service Company, P.C. ranges from small closely held companies to very large corporations and government entities. Mr. Esuchanko is responsible for the design, installation and administration of all types of pension plans and public employee systems.

Mr. Esuchanko received his undergraduate degree from West Chester University in 1964 and entered the actuarial profession in 1968, when he joined Educators Mutual Life Insurance Company in Lancaster, PA. In 1972, he successfully completed the examination and other requirements to become an Associate of the Society of Actuaries. He met the requirements of the American Society of Pension Professionals and Actuaries to be designated a Member in 1974. He was enrolled by the Joint Board for the Enrollment of Actuaries to perform actuarial services under the Employee Retirement Income Security Act of 1974, in 1976. In 1976, he also met the education and admission requirements to be enrolled as a Member of the American Academy of Actuaries. He received the designation of Fellow of the Conference of Consulting Actuaries in 2005.

Mr. Esuchanko was named Pension Actuary for Security Mutual Life Insurance Company of New York in 1973. In 1975, he joined Beyer Barber, Inc. as Vice President

and Actuary. He was named Assistant Vice President at Johnson & Higgins in Detroit, MI, after joining them in 1979. His final position before forming Actuarial Service Company was as Senior Consultant for Coopers & Lybrand in Detroit.

Mr. Esuchanko's experience in the technical and practical aspects of employee benefit plans has resulted in lecture engagements before various professional groups, including the Michigan Association of Public Employee Retirement Systems and the National Public Employees' Retirement Funds Summit. He is also a former instructor for the Certified Pension Consultant program of the American Society of Pension Professionals and Actuaries and has taught pension courses at Walsh College in Troy, MI. Nationally, Mr. Esuchanko has served on the Committee on Professional Conduct of the American Society of Pension Professionals and Actuaries and the Enrolled Actuary Examination Committee.

Mr. Esuchanko first began providing actuarial services to public employee retirement systems in 1975 when he was Vice President and Actuary for Beyer Barber, Inc. in Allentown, PA. Most recently, with respect to public employee clients, he has mainly served as the reviewing actuary for Actuarial Service Company. However, he has been the lead actuary for larger projects, most notably The City of Houston, Texas and The State of Alaska. Mr. Esuchanko's work with DROPs and retirement system funded status analysis has been cited in newspapers and national journals such as the New York Times, Fortune Magazine, Christian Science Monitor, Business Week and the Houston Chronicle. The Juneau Empire and the Fairbanks News Miner have cited his work analyzing the funded status of the Alaska Public Employees' Retirement System.

APPENDIX B

APPENDIX B

Sworn Testimony During Last Four Years

Joseph Esuchanko, MAAA, ASA, MSPPA, FCA, EA

Michigan Employment Relations Committee: City of Wyandotte Firefighters Local 356 v. City of Wyandotte - 2004

Michigan Employment Relations Committee: Commerce Township Firefighters Local 2154 v. Commerce Township - 2006

Superior Court of the State of California for the County of San Diego: San Diego City Employees' Retirement System v. San Diego City Attorney Michael J. Aguirre, et al. - 2006

Exhibit 5

Litigation Related Payments - SDCERS LITIGATION

Latham & Watkins

	Check Number	Check Date	Invoice Number	Check Amount	Description
1	8555177	01/05/06	W50406987	\$ 148,990.10	POA v. Michael Aguirre, et al.
2	8555177	01/05/06	W50406188	24,469.50	POA v. Michael Aguirre, et al.
3	8555177	01/05/06	W50407738	25,000.00	POA v. Michael Aguirre, et al.
4	7431284	12/05/06	50407738	139,226.62	POA v. Michael Aguirre, et al.
5	7431284	12/05/06	50408490	36,937.57	POA v. Michael Aguirre, et al.
6	7431284	12/05/06	60400012	65,973.67	POA v. Michael Aguirre, et al.
7	7431284	12/05/06	60405271	71,988.01	POA v. Michael Aguirre, et al.
8	8596246	06/01/06	60402224	109,707.20	POA v. Michael Aguirre, et al.
9	8599381	06/14/06	60402848	79,083.50	POA v. Michael Aguirre, et al.
10	7435943	12/27/06	60400696	79,886.70	SDPOA vs Aguirre and Aaron v. City of SD
11	7435943	12/27/06	60401402	43,201.90	SDPOA vs Aguirre and Aaron v. City of SD
12	7435943	12/27/06	60403676	106,724.00	SDPOA vs Aguirre and Aaron v. City of SD
13	7435943	12/27/06	60404532	156,589.10	SDPOA vs Aguirre and Aaron v. City of SD
14	7435943	12/27/06	60405921	168,282.95	SDPOA vs Aguirre and Aaron v. City of SD
15	7435943	12/27/06	60406697	191,404.07	SDPOA vs Aguirre and Aaron v. City of SD
16	7435943	12/27/06	60407394	62,410.11	SDPOA vs Aguirre and Aaron v. City of SD
17	7435943	12/27/06	60408073	38,133.00	SDPOA vs Aguirre and Aaron v. City of SD
18	7477422	06/21/07	70400022	39,097.20	SDPOA vs Aguirre and Aaron v. City of SD
19	7477422	06/21/07	70400708	114,270.97	SDPOA vs Aguirre and Aaron v. City of SD
20	7498817	09/24/07	70400708	3,631.83	SDPOA vs Aguirre and Aaron v. City of SD
21	7498817	09/24/07	70401454	332,315.05	SDPOA vs Aguirre and Aaron v. City of SD
22	7498817	09/24/07	70402249	198,168.20	SDPOA vs Aguirre and Aaron v. City of SD
23	7498817	09/24/07	70403026	174,564.17	SDPOA vs Aguirre and Aaron v. City of SD
24	7498817	09/24/07	70403766	70,460.89	SDPOA vs Aguirre and Aaron v. City of SD
25	7498817	09/24/07	70404641	\$ 69,453.60	SDPOA vs Aguirre and Aaron v. City of SD
				\$ 2,540,969.91	

Heller Erhman

	Check Number	Check Date	Invoice Number	Check Amount	Description
1	8545812	11/28/2005	10375222	\$ 89,437.32	SDCERS
2	8545812	11/28/2005	10375221	155,449.58	SDCERS
3	8583151	4/19/2006	10382183	266.10	SDCERS
4	8583151	4/19/2006	10382182	4,847.00	SDCERS
5	8605155	7/6/2006	10378148	18,676.00	City Employees' Retirement v. Michael Aguirre
6	8605155	7/6/2006	10386164	40,211.39	City Employees' Retirement v. Michael Aguirre
7	8605155	7/6/2006	10391454	67,773.72	City Employees' Retirement v. Michael Aguirre
8	8605155	7/6/2006	10393810	81,347.55	City Employees' Retirement v. Michael Aguirre
9	8550471	12/15/2005	10382182	95,531.78	litigation against outside professionals and consultants
10	8550471	12/15/2005	10382183	39,884.33	litigation against outside professionals and consultants
11	8552237	12/22/2005	10378148	112,616.14	litigation against outside professionals and consultants
13	8583152	4/19/2006	10382183	1,784.90	litigation against outside professionals and consultants
14	8603448	6/29/2006	10391456	264,509.46	City v. Callan, et al.
15	8603448	6/29/2006	10386163	180,710.39	City v. Callan, et al.
16	8603448	6/29/2006	10393809	81,260.50	City v. Callan, et al.
17	8603448	6/29/2006	10396026	663.00	City v. Callan, et al.
18	8604563	7/5/2006	10378147	\$ 106,927.18	City v. Callan, et al.
				\$ 1,321,896.34	

Wehner & Perlman

	Check Number	Check Date	Invoice Number	Check Amount	Description
	8537637	10/26/2005	1	\$ 10,830.00	legal services related to the case POA v. City of San Diego, et al.
	8545813	11/28/2005	2	14,959.08	legal services related to the case POA v. City of San Diego, et al.
	8568289	2/23/2006	3	12,167.10	legal services related to the case POA v. City of San Diego, et al.
	8577797	3/30/2006	4	8,910.00	legal services related to the case POA v. City of San Diego, et al.
	8578177	4/3/2006	5	4,230.00	legal services related to the case POA v. City of San Diego, et al.
	8594143	5/24/2006	6	10,598.93	legal services related to the case POA v. City of San Diego, et al.
	8594143	5/24/2006	7	14,399.10	legal services related to the case POA v. City of San Diego, et al.
	8597440	6/6/2006	8	14,258.90	legal services related to the case POA v. City of San Diego, et al.
	7431280	12/5/2006	9	13,546.37	legal services related to the case POA v. City of San Diego, et al.
	7431280	12/5/2006	10	12,060.00	legal services related to the case POA v. City of San Diego, et al.
	7431280	12/5/2006	11	13,246.24	legal services related to the case POA v. City of San Diego, et al.
	7431280	12/5/2006	12	4,625.57	legal services related to the case POA v. City of San Diego, et al.
	7431280	12/5/2006	13	18,355.30	legal services related to the case POA v. City of San Diego, et al.
	7431591	12/6/2006	14	12,318.43	legal services related to the case POA v. City of San Diego, et al.
	7435939	12/27/2006	15	18,555.76	legal services related to the case POA v. City of San Diego, et al.
	7449950	2/28/2007	16	7,276.03	legal services related to the case POA v. City of San Diego, et al.
	7476834	6/20/2007	17	5,070.00	legal services related to the case POA v. City of San Diego, et al.
	7476834	6/20/2007	18	10,342.50	legal services related to the case POA v. City of San Diego, et al.
	7476834	6/20/2007	19	\$ 10,216.34	legal services related to the case POA v. City of San Diego, et al.
				\$ 215,965.65	

Kramm & Associates

	Check Number	Check Date	Invoice Number	Check Amount	Description
1	8600534	6/19/2006	10474	\$ 1,805.70	SDCERS v City Attorney
2	8604073	07/03/06	10365	1,129.40	SDCERS v City Attorney
3	8605160	07/06/06	106953	1,145.35	SDCERS
4	8608193	7/17/2006	10721	527.15	SDCERS
5	8608694	07/18/06	10538	1,194.50	SDCERS
6	8608694	07/18/06	10529	1,059.95	SDCERS
7	8608694	07/18/06	10587	1,680.00	SDCERS
8	8608694	07/18/06	10580	1,772.50	SDCERS
9	8608694	07/18/06	10597	1,295.60	SDCERS
10	8610016	07/24/06	10827	191.25	SDCERS
11	8610016	07/24/06	10768	\$ 750.15	SDCERS
				\$ 12,551.45	

Litigation Related Payments - SDCERS LITIGATION

Actuarial Consulting Services

Check No.	Check Date	Invoice Number	Check Amount	Description
7438549	1/9/2007	60370	\$ 81,346.49	Litigation Consulting Services
7410498	9/12/2006	60370	1,320.00	Litigation Consulting Services
7465220	39204	60370	\$ 100,958.16	Litigation Consulting Services
			\$ 183,624.65	

Legal Reprographics

Check Number	Check Date	Invoice Number	Check Amount	Description
1	8574089	03/16/06	0180764-IN	\$ 145.47 SDCERS.
2	7410032	09/11/06	0185336-IN	171.76 SDCERS
3	7410032	09/11/06	0185378-IN	106.08 SDCERS
4	7410032	09/11/06	0185377-IN	144.04 SDCERS
5	7410032	09/11/06	0187442-IN	64.65 SDCERS
6	8576499	03/27/06	0181283-IN	48.49 SDCERS.
7	8577800	03/30/06	0181689-IN	299.03 SDCERS V. Aguirre
8	8577800	03/30/06	0181718-IN	1,011.78 SDCERS V. Aguirre
9	7426910	11/16/06	0166973-IN	279.59 SDCERS.
10	8608693	07/18/06	0185424-IN	175.09 SDCERS
11	8608693	07/18/06	0186011-IN	676.84 SDCERS
12	8610687	07/26/06	0186019-IN	1,938.64 SDCERS
13	8610020	07/24/06	0186188-IN	1,573.74 SDCERS
14	8610020	07/24/06	0186265-IN	3,730.48 SDCERS
15	7412396	09/20/06	0185377-IN	144.04 SDCERS
16	7412396	09/20/06	0185378-IN	106.08 SDCERS
17	7402235	08/07/06	0186473-IN	172.40 Aguirre V.SDCERS
18	8605164	07/08/06	0185586-IN	262.03 SDCERS
19	8605164	07/08/06	0185499-IN	193.09 SDCERS
20	8605164	07/08/06	0185594-IN	986.82 SDCERS
21	8596251	06/01/06	0183675-IN	37.72 SDCERS
22	8595398	06/30/06	183702-IN	43.10 SDCERS
23	8586396	05/02/06	0182716-IN	16.55 SDCERS V. AGUIRRE.
24	8586396	05/02/06	0182569-IN	164.46 SDCERS V. AGUIRRE.
25	8586396	05/02/06	0182347-IN	1,246.61 SDCERS V. AGUIRRE
26	8583687	04/20/06	0180871-IN	86.29 INVOICE SDCERS
27	8588290	02/23/06	0180267-IN	114.85 SDCERS
28	8552773	12/27/05	0177980-IN	816.81 SDCERS
29	8586010	05/01/06	0182102-IN	24.83 SDCERS
30	8525248	09/14/05	0173633-IN	155.62 Pension litigation
31	8525248	09/14/05	0173632-IN	\$ 81.57 Pension litigation
			\$ 15,018.55	

VideoTrack

Check Number	Check Date	Invoice Number	Check Amount	Description
1	8595400	5/30/2006	4/25/2006	\$ 1,443.85 SDCERS
2	8595400	5/30/2006	5/2/2006	1,982.60 SDCERS
3	8595400	5/30/2006	5/4/2006	190.00 SDCERS
4	8595400	5/30/2006	5/4/2006	202.00 SDCERS
5	8604070	7/3/2006	6/5/2006	190.00 SDCERS
6	8604070	7/3/2006	6/8/2006	190.00 SDCERS
7	8604070	7/3/2006	5/3/2006	972.43 SDCERS
8	8604070	7/3/2006	5/5/2006	478.12 SDCERS
9	8604070	7/3/2006	5/16/2006	763.38 SDCERS
10	8604070	7/3/2006	5/9/2006	1,152.91 SDCERS
11	8606650	7/12/2006	5/17/2006	1,166.25 SDCERS
12	8606650	7/12/2006	5/24/2006	1,101.73 SDCERS
13	8608692	7/18/2006	5/18/2006	1,162.33 SDCERS
14	7400544	7/31/2006	06/13-23/2006	1,123.29 SDCERS
15	7400544	7/31/2006	6/13/2006	228.28 SDCERS
16	7400544	7/31/2006	6/9/2006	779.72 SDCERS
17	8610018	7/24/2006	6/2/2006	401.37 SDCERS
18	8610018	7/24/2006	6/7/2006	\$ 443.12 SDCERS
			\$ 13,959.38	

AJL Video

Check Number	Check Date	Invoice Number	Check Amount	Description
1	8606169	7/6/2006	60683	\$ 909.15 SDCERS
2	8606259	7/11/2006	60716	878.32 Pension
3	8606259	7/11/2006	60691	950.00 Pension
4	8606259	7/11/2006	60685	1,299.73 Pension
5	8610017	7/24/2006	60731	1,076.93 SDCERS
6	8610017	7/24/2006	60714	5,090.71 SDCERS
7	8610019	7/24/2006	60690	\$ 1,952.97 SDCERS
			\$ 12,157.81	

Total All Vendors 4,316,143.74

Exhibit 6

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

Official
Version from
Court Received
1700 6 March

DATE: March 6, 2006 DEPT: 69 REPORTER A: Not Reported

PRESENT HON.: JEFFREY B. BARTON REPORTER B:
JUDGE

CLERK: Deborah Jellison

BAILIFF: None

REPORTERS' ADDRESS: P.O. BOX 120128
SAN DIEGO, CA 92112-0128

FILED
MAR 06 2006
JESSIE J. JELISON, Deputy
CSR#

ORDER AFTER HEARING

GIC 841845 : IN RE THE MATTER OF:

SAN DIEGO CITY EMPLOYEES' RETIREMENT
SYSTEM, by and through its Board of Administration,
Plaintiff,

By: Reg Vitek

vs.

SAN DIEGO CITY ATTORNEY MICHAEL J. AGUIRRE,
THE CITY OF SAN DIEGO,
Defendants.

By: Don McGrath

AND CROSS RELATED MATTERS.

On February 15, 2006, the Court heard oral argument on plaintiff San Diego City Employees' Retirement System's ("SDCERS" or "board") Motion for Summary Adjudication to issue one and to the City of San Diego's ("City") Amended Motion to Strike Unions' Complaints in Intervention. The Court took the matter under submission. During the hearing, the Court received, without objection, from the City Attorney's office, a copy of the power point presentation, and set of documents, which included the following:

1. Charter section 40
2. Ordinance 10792
3. Charter section 145, Ch. 61
4. SDMC 22.1801
5. Agreement Legal Retirement System Legal Services, dated April 9, 1997.
6. Bianchi case
7. Ordinance 18600 (0-99-54)
8. Various cases.

CASE NO.: GIC 814845

ORDER AFTER HEARING MINUTES

DATE: 03/06/06

1 of 7

On February 16, 2006, the Court confirmed the tentative ruling of February 14, 2006, regarding the Motion to Strike. The Court vacates the tentative ruling of February 14, 2006, regarding the Motion for Summary Adjudication, and enters the following order:

MOTION FOR SUMMARY ADJUDICATION

I. Summary of Ruling:

In this section of the Order After Hearing, the Court provides a brief summary of the ruling on the limited issue concerning legal representation of SDCERS in this action. A more detailed ruling follows. This order is limited to the issue of the legal representation of SDCERS before the Court at this time and does not in any way reflect a ruling on the merits of the underlying dispute.

Plaintiff SDCERS' Motion for Summary Adjudication as to issue number one is granted as limited below to the facts of this case for the following primary reasons:

1. The issue of whether SDCERS is an independent entity from the City has been litigated in the past. As a result of this past litigation, the Court of Appeals has determined SDCERS is an independent entity. The Court is bound by this precedent. See discussion of *Bianchi v. City of San Diego*, (1989) 214 Cal. App. 3d 563, in which the City and SDCERS successfully contended SDCERS was a separate entity, below. Further support for the independence of retirement boards in general is found in *Singh v. Board of Retirement*, (1996) 41 Cal. App 4th 1180.
2. In 1992 the voters of the State of California passed proposition 162. This proposition became part of the State Constitution. As a result, the California Constitution gives SDCERS "sole and exclusive fiduciary responsibility over the assets of the public pension system." The purpose of the proposition in the ballot argument was to protect pension systems from political influence. The voters may not have contemplated the nature of the current dispute when the Constitution was modified in 1992. The Court makes no determination whatsoever in this ruling concerning the merits of the dispute between the parties in this case. However, the Court is obligated to follow the law as set forth in the California Constitution, which identifies independent responsibilities and duties for public pension boards.
3. There is a conflict between the legal positions of the City and SDCERS in this action. The City has sued SDCERS in a cross-complaint and seeks a determination that certain benefits are illegal. SDCERS has sued the City and seeks a determination that the same benefits are legal. Each side to this dispute is entitled to both separate and independent legal representation. Due process mandates that each side to a dispute have an independent opportunity to present its case. One side cannot dictate the choice of legal representation to the other. (There are several other pending cases in which a conflict in the legal position exists between the City and SDCERS).
4. An analysis of several additional technical issues is set forth below.

II. Analysis:

Plaintiff SDCERS' Motion for Summary Adjudication to issue one is granted. On the first cause of action declaratory relief in the complaint, SDCERS is empowered to employ legal counsel of its choosing separate

independent from the City and the Office of the City Attorney of the City of San Diego. This ruling is restricted to the totality of the facts that currently exist between the parties, including the City Charter, current City Ordinances, the California Constitution, existing case law and the panoply of adverse claims between the parties presented in this case and others. Accordingly, the Office of the City Attorney has no right to fire SDCERS's independent counsel and appoint counsel of its choosing for the very case the City Attorney is prosecuting against SDCERS.

SDCERS seeks a judicial determination by the Court contending that as an independent entity, it has the right under the California Constitution and case law to hire attorneys of its choice. The City opposes this motion contending that under the City Charter, the City Attorney is responsible for advising and representing the pension board.

During oral argument, the City referenced for the first time Ordinance 10792(6), enacted in 1926, which provided that the City Attorney represents the board of administration, and San Diego Municipal Code ("SDMC") section 22.1801, where the City listed the departments of the City, one of which was "City Retirement." Accordingly, the Court strikes the language in the tentative ruling, "The City has cited no authority that the board is merely a department or office of the City. In contrast, the City Charters of Los Angeles and San Francisco directly give authorization for the City Attorney to represent boards. (D's Ex. G, §271; Ex. H, §6.102.)"

Nonetheless, while City Retirement as established in 1926 may be considered a department, under existing law it is a department that may be sued and sue in its own name. Moreover, it has evolved into a retirement board both recognized under, and subject to, state law and the California Constitution. It is the duty of the Court to follow existing law. The Fourth District Court of Appeals, Division One in *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, analyzed the role of SDCERS, and determined that the system is an independent entity from the City for the purposes of res judicata. The parties in *Bianchi* sought a legal determination that SDCERS was separate from the City to avoid the impact of res judicata. Although the City attempts to limit this ruling, the Court noted:

The retirement system is established as an independent entity; all funds for the system are required to be segregated from city funds, placed in a separate trust fund under the exclusive control of the Retirement Board, and may only be used for retirement system purposes. (San Diego City Charter, art. IX, §§ 141, 145.) The Retirement Board acts as an independent administrator empowered to conduct actuarial studies to determine conclusively the amounts of contributions required of the City and participating employees. The board has the sole authority to determine the rights to benefits from the system, and to control the administration of and investments for the fund. (*Ibid.*)

Further support that SDCERS is a separate entity is found in *Singh v. Board of Retirement* (1996) 41 Cal.App.4th 1180, 1185-1186, which reinforced the view that boards should be independent of legislative and executive branch interference, even though Proposition 162's main purpose was to prevent these entities from diverting retirement funds. The Court reasoned, "[C]learly the word 'plenary' was intended to mean that retirement boards would have sole and complete power to administer their systems, as opposed to being subject to direction from state and local legislative and executive bodies in these matters." (*Id.* at 1192; See also, *Bandt v. Board of Retirement, San Diego County Employees Retirement Association* (2006) 38 Cal.Rptr.544, 554-555.)

In 1992, the voters of the State of California passed Proposition 162 and made it part of the California Constitution. The City argues that the intent of the voters under Proposition 162 was to prevent the raiding of public pension funds only. The City further argues since the City Attorney does not have the authority to control the city budget, designating the City Attorney as the chief legal advisor to SDCERS does not contradict the plain language and/or the legislative intent of California Constitution Article XVI, section 17. The City places great emphasis that the City Attorney is an elected official and stresses the legislative intent behind Proposition 162.

The ballot argument in favor of Proposition 162 states, "Do you believe politicians should be able to raid the pension funds of retirees?" (D's Ex. H, p. 38.) The comment section of California Constitution, Article XVI, 17(g) states as follows:

The People of the State of California hereby find and declare as follows:

- (c) Politicians have undermined the dignity and security of all citizens who depend on pension benefits for their retirement by repeatedly raiding their pension funds.
- (f) To protect pension systems, retirement board trustees must be free from political meddling and intimidation.

The voters may not have contemplated a dispute like the current one when Proposition 162 was enacted and made part of the California Constitution. However, the Court cannot weight the merits or motivations of the litigants. Both the ballot statement and the clear language of the California Constitution stand for the proposition that retirement boards have independent duties and responsibilities. The Court relies on the plain language of the California Constitution, which gives the pension system "sole and exclusive fiduciary responsibility over the assets of the public pension system" and further charges the pension board with "sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries." (Calif. Constitution Article 16, section 17(a).) The board has the power to use its assets to retain counsel of its own choosing to assure the prompt delivery of benefits and related services to the participants. The underlying litigation in this case pertains to the legality of those benefits.

During oral argument in support of its position that the City Attorney should represent SDCERS, the City stated that the former City Attorney Witt represented the City and SDCERS in *Bianchi*. However, *Bianchi* was decided in 1989, prior to enactment of Proposition 162. Additionally, the City and SDCERS appear to have been united in their position in that action and there is no evidence SDCERS objected to representation by the City Attorney. Thereafter, subsequent to Proposition 162, as early as 1995, recommendations were made, and later approved for the board to have independent counsel. Since 1997, SDCERS has had independent counsel separate from the City Attorney's office.

City Charter Article IX, section 144, grants the authority to "appoint such other employees as may be necessary" to the discharge of its duties under the Constitution and Charter. (D's Ex. F.) On April 9, 1997, SDCERS entered into an agreement with the City Attorney which recognized that SDCERS' unique position as an independent entity made it necessary to create a separate legal services division containing the position of General Counsel, who would serve at the pleasure of the board. (P's Ex. G.) The agreement makes note of the potential for a conflict for the office of the City Attorney in the representation of the City and SDCERS on matters involving divergent interests. It states as follows:

"D. This unique fact raises ethical considerations for the City Attorney when the interests of either the City or the board are not in harmony with each other. This can happen in a variety of recurring situations involving funding situations, contribution rates and benefit determinations.

E. In these situations, the City Attorney cannot choose which client to represent. Under the canons of ethics, the City Attorney may not represent either. Two sets of outside counsel are required. This is both expensive and unnecessary." (P's Ex. G at page 1).

On April 15, 1997, the Civil Service Commission notified the mayor and city council of its conclusion that positions of SDCERS general counsel and assistant general counsel met the requirements for exemption from classified service under the Charter, Article VIII, section 117.

On May 27, 1997, after the Civil Service Commission had notified the mayor and city council of its conclusions that the positions of SDCERS' general counsel and assistant general counsel met the requirements for exemption from classified service under Charter section 117, the city council enacted Ordinance Number 0-18406, which implemented the positions. (UMF 5 & 6, P's Ex. I.) Since 1997, SDCERS has had independent counsel.

The City enacted Ordinances 0-99-54, and Ordinance No.0-18600, recognizing that the board employs general counsel to provide legal advice. (P's Ex. N.) SDMC §24.0910, which is based on these ordinances, provides that "Unless otherwise provided by Memorandum of Understanding between the City Attorney and the Board of Administration, the City Attorney shall designate one or more Assistant City Attorneys or Deputy City Attorneys to advise and represent the Board of Administration." The 1998 Memorandum of Understanding ("MOU") signed by both the City Attorney and the board, recited that in recognition of the complexity of the legal issues surrounding the SDCERS board's fiduciary responsibilities under Proposition 162, the two professional positions were classified as General Counsel and Assistant General counsel, and were separately classified consistent with the City Service Commission's action. Within the 1998 MOU, the board did not concede that the City Attorney was its legal counsel, but reiterated its position that in its opinion it had the power to hire its own lawyers under Proposition 162, notwithstanding the provisions of Section 40 of the San Diego City Charter. Neither party entered into any admissions by the 1998 MOU. (P's Ex. K, ¶C, D.) The City Attorney has agreed to enter into the 1998 MOU providing that the board will retain its own separate legal counsel for all matters related to the performances of its fiduciary duties, and the board, not the City, has paid its attorneys. (P's Ex. K, ¶2.)

Thereafter, the City Attorney has given notice of the cancellation of this 1998 MOU and contends the City Attorney shall represent the interests of the pension board. During oral argument the City Attorney made assurances concerning the appointment of qualified independent counsel for the pension board. The board's lawyers would be of the choosing of the City Attorney to represent the board in this and other litigation where the interests are in conflict. Under this plan, the lawyer for one party would be choosing the lawyer for the opposing party the lawyer is suing.

Viewed in isolation, under the terms of the 1998 MOU and SDMC Section 24.0910, the City may be correct that the City Attorney would be the attorney for the board when the MOU is rescinded. Left for further analysis is the issue of whether further City Council action would be required to rescind the other implementing ordinances discussed above.

The effect of a determination solely on this basis would mean the City would prosecute this and other actions against the pension board. The City could fire the pension board's lawyers and substitute in other attorneys of the City's choosing. The question becomes whether such a result can occur under the entirety of the law governing the relationship between the City, SDCERS and public attorneys. As discussed above, such a result would appear contrary to the intent of Proposition 162 and the holding of *Bianchi*, supra.

The City again relies on *Westly v. California Public Employees' Retirement System Board of Administration* (2003) 105 Cal.App.4th 1095, 1110, that the authority granted a retirement system under Section 17 is limited to actuarial services and management and distribution of the assets for which the board has a responsibility. As set forth in the August 23, 2005 demurrer ruling, *Westly* is distinguishable because the issue was not whether some other entity was the governing body of the board but whether the board's authority over the administration of the system was in

conflict with the laws governing state civil service and payment of expenses. (*Id.* at 1112.) The Court held the board does not have plenary authority to evade the law that limits the pay of the board and its employees, that specifies the employees exempt from civil service, and that authorizes the Controller to issue warrants and audit their legality. (*Id.* at 1110.) In contrast, SDCERS did comply with the civil service requirements regarding the positions of its attorneys and pay. Furthermore, Section 144, as set forth above, specifically allows the board to hire employees to carry out its plenary responsibilities.

SDCERS relies on *Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, that if it meets the four element test, as a matter of law, SDCERS is entitled to select its own legal counsel. The Court is not persuaded that *Creighton* is controlling because it was decided four years before *Blanchi, supra*, by the Second District Court of Appeal and prior to enactment of Proposition 132. The City is correct that *Creighton* is distinguishable because the Court emphasized that the Santa Monica Rent Control Board was an elected body as a basis for determining it was independent. In contrast, SDCERS members are appointed generally and actions are approved by its members.

SDCERS argues that "nothing in the Charter, including section 40, can be construed to strip SDCERS of any part of the plenary authority granted by the Constitution to administer the Retirement System." SDCERS suggests that no municipal ordinance may ever be enacted that would allow the City Attorney to represent SDCERS and cites *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897, that "if otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." A conflict exists if the local legislation "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (*Ibid.*) The Court declines to extend this ruling that for all purposes and for all time, the board has the right to independent counsel. The Court's ruling applies to the issues as presented under the current City Charter, the City Council's ordinances, the California Constitution as applied to the facts of this case and the multiple instances of adverse current litigation pending between the parties. It applies to the current dispute where the City Attorney has represented the City in its' action against SDCERS and has stated an intent to appoint the attorneys for SDCERS in the very litigation he is prosecuting. It is improper for the Court to give "advisory rulings" of what possible rulings would be on future events or laws not yet occurring or enacted.

This Court may not ignore the fact that since 1997, SDCERS has had its own independent counsel. To insist under these circumstances that the City Attorney's office represent SDCERS would invite an actual conflict of interest. There are related cases involving retirement issues, including *Gleason v. Gabriel, Roeder, Smith & Company-GIC* 849882, and *McGuigan v. City of San Diego-GIC* 841487. These cases were identified by the City in its Notice of Related Cases filed in this action.

The City's objection that SDCERS in its reply argued new matters is overruled. SDCERS was responding to the City's argument that the City Attorney is empowered to concurrently act as counsel for not only the City, but also for SDCERS. The conflict of interest argument has been raised at various levels and is not viewed in isolation. SDCERS' objection to the sur-reply is overruled.

There is a clear conflict in the legal position of the City and SDCERS in this litigation. The City has sued SDCERS in a cross-complaint and seeks a determination that certain benefits are illegal. SDCERS in its suit seeks a determination the benefits are legal. The City Attorney may not represent both entities in this dispute. (See, *Civil Service Commission v. Superior Court*, (1984) 163 Cal. App. 3d 70.) Each side has a need for separate and independent legal representation for a determination of these issues. The ability of a litigant to present its position in court is the hallmark of due process. One side to such a dispute cannot dictate the choice of legal representation to the other.

Accordingly, plaintiff's Motion for Summary Adjudication is granted, but this ruling is restricted to the totality of the facts that currently exist between the parties, including the City Charter, current City Ordinances, the California Constitution, existing case law and the panoply of current adverse claims between the parties presented in this case and others.

Judicial notice is granted, as requested by both parties, except as to the City's request to # 7 and # 8. No court order or document was filed to support the City's contentions on these items.

The City's request for consideration of new evidence is not properly before the Court, as the evidence was filed after this matter was submitted for decision. To review evidence filed after the case was submitted deprives the opponent of the right to oral argument and thus cannot be considered.

Accordingly, SDCERS' Motion for Summary Adjudication is granted as set forth in this ruling.

IT IS SO ORDERED.

JEFFREY B. BARTON

DATED: March 6, 2006

JEFFREY B. BARTON
Judge of the Superior Court

-ddj-

Exhibit 7

Exhibit 7 is all of the Kroll Reports